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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 717

ALUMINUM COMPANY OF AMERICA, ET AL,
Petitioners,

v.

WOODS EXPLORATION & PRODUCING COMPANY, INC., ET AL,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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FIDELITY PRINTING COMPANY, INC., HOUSTON

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Petitioners, Aluminum Company of America, Crown Central Petroleum Corporation, and Pocantico Oil & Gas Corp. pray that a writ of certiorari issue to review the judgment of the Supreme Court of Texas (App. B), which affirmed the judgment of the District Court of Travis County, 53rd Judicial District of Texas (App. A), in a direct appeal by the Railroad Commission of Texas and by these Petitioners from that judgment. The judgment of the District Court granted the motion for summary judgment filed by the Respondents Woods Exploration & Producing Company, Inc. and Southeastern Pipeline Company, as plaintiffs, and by the Respondents Ben Novak, Claire Benz-Stoddard, and Lumar Gas Corporation, as intervener plaintiffs, and decreed against the Petitioners and against the Railroad Commission of Texas, as defendants, that the ruling of the Railroad Commission and the formal order of the Railroad Commission adopting a new procedure for determining the maximum limit on the monthly reservoir production allowables for five gas reservoirs in the Appling Field in

Calhoun County, Texas, was not within the statutory authority of the Railroad Commission under Sections 10, 11, and 12, Article 6008, R.C.S. of Texas, that such order placing a maximum limit on such field allowables was null and void, and that the defendant Railroad Commission of Texas was permanently enjoined from enforcing or attempting to enforce said order.

In affirming the judgment of the District Court the majority of the Supreme Court of Texas found that prior to adoption of the invalidated order the Respondents, as operators of small tract or town lot wells, were draining vast quantities of gas from the lands of Petitioners as owners of large tract gas wells in the same field by means of the ⅓-⅔ individual well allocation formula adopted by the Railroad Commission of Texas for the field (which divided the reservoir allowable on the basis of ⅓ to the well and ⅔ to the acreage on which the well was situated), as well as by means of draining gas from Petitioners' underlying gas reservoir through well bore communication between such underlying reservoir and overlying, depleted reservoirs in Respondents' wells having multiple completions in different reservoirs in the same well bore (App. D, p. 9a-11a). The majority opinion conceded that this enables the Respondents to produce *"far more* of the reservoir allowable *than their share* as determined by the basic ⅓-⅔ allocation formula, and the *drainage advantage which the small tract operators already enjoy by virtue of the formula itself was thus substantially enhanced"* (App. D, p. 10a) (Emphasis supplied.), but held that Section 12 of Article 6008 nevertheless precluded the Railroad Commission of Texas from limiting this confiscation by placing a ceiling on the reservoir allowables through a formula providing that the reservoir allowable should not exceed an amount under which the best well in the field if located on the

largest tract would be able to produce its individual well allowable received by it under the ⅓-⅔ allocation formula.

Opinions Below

A copy of the judgment of the District Court of Travis County, 53rd Judicial District of Texas, entered without written opinion, is copied herein as Appendix A. The judgment of the Supreme Court of Texas is copied herein as Appendix B, and the Order of that Court denying Petitioners' Motion for Rehearing is copied herein as Appendix C. The majority opinion of the Supreme Court of Texas is copied herein as Appendix D. The dissenting opinion of Mr. Justice Smith, in which Mr. Justices Hamilton and Norvell joined, is copied herein as Appendix E. The dissenting opinion of Mr. Justice Hamilton, in which Mr. Justices Smith and Norvell also joined, is printed herein as Appendix F. These opinions are reported as *Railroad Commission of Texas, et al* v. *Woods Exploration and Producing Company, Inc., et al,* 405 S.W. 2d 313 (Tex. 1966).

Jurisdiction

The judgment of the Supreme Court of Texas sought to be reviewed was dated and entered on June 22, 1966 (Appendix B). The motion for rehearing of Petitioners and Railroad Commission of Texas was timely filed on June 29, 1966. The order of the Supreme Court of Texas denying the motion for rehearing filed by the Railroad Commission of Texas and by these Petitioners was entered on July 27, 1966 (Appendix C). The Supreme Court of Texas further entered an order on August 10, 1966, staying the issuance of mandate in this case and the execution and enforcement of judgment therein for a period of 90 days from July 27, 1966 (Appendix G).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) since the validity of § 12 of Art. 6008, the gas proration statute of the State of Texas, as applied in this action is drawn in question on the ground of its being repugnant, as applied in this action, to the equal protection of the laws and the due process of law clauses of the Fourteenth Amendment to the Constitution of the United States.

Question Presented

Whether a Texas Supreme Court majority decision invalidating an order of the Texas Railroad Commission found necessary to protect the correlative rights of Petitioners in a common gas reservoir and to prevent the admitted confiscation of Petitioners' gas by Respondents on the ground that such order was violative of and beyond the powers of the Commission under Section 12 of Article 6008, Texas Revised Civil Statutes (1962), construes and applies such statute so as to deny Petitioners the equal protection of the laws and to take Petitioners' property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

Constitutional Provisions and Statutes Involved

Those provisions of Article 6008, Revised Civil Statutes of Texas, which are pertinent here are as follows:

> "Sec. 1. In recognition of past, present, and imminent evils occurring in the production and use of natural gas, as a result of waste in the production and use thereof in the absence of correlative opportunities of owners of gas in a common reservoir to produce and use the same, this law is enacted for the protection of public and private interests against such evils by prohibiting waste and compelling ratable production.
>
> . . .

Sec. 10. It shall be the duty of the Commission to prorate and regulate the daily gas well production from each common reservoir in the manner and method herein set forth. The Commission shall prorate and regulate such production for the protection of public and private interest:

(a) In the prevention of waste as 'waste' is defined herein;

(b) In the adjustment of correlative rights and opportunities of each owner of gas in a common reservoir to produce and use or sell such gas as permitted in this Article.

"Sec. 11. The Commission shall exercise the authority to accomplish the purpose designated under item (a) of Section 10 when the presence or imminence of waste is supported by a finding based upon the evidence introduced at a hearing to be held as herein provided.

"The Commission shall exercise the authority to accomplish the purpose designated under item (b) of Section 10 when evidence introduced at a hearing to be held as herein provided will support a finding made by the Commission that the aggregate lawful volume of the open flow or daily potential capacity to produce of all gas wells located in a common reservoir, is in excess of the daily reasonable market demand for gas from gas wells that may be produced from such common reservoir, to be utilized as permitted in this Article.

"Sec. 12. It shall be the duty of the Commission to determine the status of gas production from all reservoirs in this state. If and when the Commission finds that waste exists or is imminent in the production of gas from any reservoir, or that the capacity of the wells to produce gas from any reservoir exceeds the market demand for gas from such reservoir, the Commission shall then proceed by proper order to prorate and regulate the gas production from such reservoir on a reasonable basis. On or before the 20th day of

each month, the Commission, after notice and hearing, shall determine (1) the lawful market demand for gas to be produced from each such reservoir during the following month; and (2) the volume of gas that can be produced from such reservoir and each well therein during the following month, without waste. The Commission shall then fix the monthly reservoir allowable of gas to be produced from such reservoir at the lawful market demand therefor or at the volume that can be produced from such reservoir without waste, whichever is the smaller quantity. The monthly reservoir allowable shall be allocated among all wells entitled to produce gas therefrom so as to give each well its fair share of the gas to be produced from the reservoir, provided that each well shall be restricted to the amount of gas that can be produced from it without waste. The volume of gas so allocated to each well shall be regarded as the monthly allowable for such well. The daily market demand for gas, and the daily allowable, shall be determined by dividing the monthly demand and the monthly allowable by the number of days in the month.

* * *

"Sec. 22. The Commission shall be vested with a broad discretion in administering this law, and to that end shall be authorized to adopt any and all rules, regulations or orders which it finds are necessary to effectuate the provisions and purposes of said law.

* * *

"Sec. 26. If any section or sections, clause, sentence or provision of this Article should, for any reason, be held to be invalid or unconstitutional, it shall not affect in anywise the remaining parts of this Article, not so held, and all that portion not held invalid shall remain in full force and effect." Vol. 16B, Vernon's Annotated Texas Statutes, pp. 407-417 (1962).

The district court and the majority opinion of the Supreme Court of Texas construe Section 12 in narrow

isolation as prohibiting the Railroad Commission of Texas from fixing a ceiling on a gas reservoir production allowable *in any amount less than the total amount which can be sold from the reservoir for lawful end uses* even though a lower maximum ceiling was admittedly necessary to protect Petitioners' correlative rights to gas in the common reservoir from violation by Respondents and in order to prevent the confiscation of vast quantities of Petitioners' gas by Respondents through tremendous drainage of gas from under Petitioners' lands.

Petitioners contend that the statute as so construed and applied to them in this case denies to Petitioners the equal protection of the laws and results in the taking of Petitioners' property without compensation and without due process of law, and such statute as so construed and applied in this case therefore violates the Fourteenth Amendment to the Constitution of the United States, i.e., the provision of Section 1 thereof reading as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

The Appling Field contains ten producing gas sands or separate gas reservoirs overlying one another (Tr. 230, 39).* The Railroad Commission of Texas has permitted

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* Transcript references used throughout are to the pages of the transcript prepared by the state district court clerk and forwarded to the Texas Supreme Court, which transcript has now been certified as Record item 12 in accordance with the rules of the United States Supreme Court for purposes of filing with this Petition for Writ of Certiorari.

Respondents to drill numerous gas wells penetrating the separate gas sands in the field on tiny town lot tracts averaging less than one acre and most of them being approximately one-tenth of an acre in size. Petitioners' wells are located on adjoining large tracts of several hundred acres in size. In addition to permitting Respondents to drill numerous town lot wells on these tiny tracts as exceptions to the general spacing pattern required by Railroad Commission Rule 37, which generally requires units of 320 acres in size, each of the separate gas reservoirs has been treated as a separate gas field for proration purposes, thereby allowing Respondents to make multiple separate completions in the different sands from single well bores and allowing Respondents separate gas production allowables for each sand.

In an earlier case between substantially the same parties now before the Court and involving these same gas reservoirs in the Appling Field, *Benz-Stoddard* v. *Aluminum Company of America*, 368 S.W. 2d 94 (Tex. 1963), the Supreme Court of Texas held that the Respondents were entitled to make multiple completions from a single well bore in numerous gas sands underlying their town lots even though production from one sand already exceeded the total quantity of gas located in all sands underlying the town lot and even though the gas produced from all sands by the town lot wells was in fact being drained from the lands of Petitioners. Benz-Stoddard in that case was permitted to complete her well in each of the ten reservoirs underlying her .115 acre tract.

In the *Benz-Stoddard* case, the Court recognized the consequent injustice to Petitioners but held out hope of later Railroad Commission relief as follows:

> "We realize that the granting by the Railroad Commission of the multiple completion order under the

> general proration order in effect in the field does create a situation in which grave injustice may be done the respondent . . ."

Then the Court added:

> "It can be seen that the validity of Rule 37 and the exception thereto is based upon the principle that the Railroad Commission can so regulate the flow of the gas that no unreasonable hardship need result from its application. This court reiterated this principle in Atlantic Refining Company v. Railroad Commission of Texas, 162 Tex. 274, 346 S.W. 2d 801, and Halbouty v. Railroad Commission of Texas, Tex. [sic] 357 S.W. 2d 364." 368 S.W. 2d at 98.

In the *Atlantic* and *Halbouty* cases cited in the above quotation from *Benz-Stoddard*, the Supreme Court of Texas had held that the Railroad Commission's ⅓-⅔ gas production allocation formula, under which the monthly gas reservoir production allowable fixed by the Railroad Commission was prorated among the large tract owners and the town lot owners having well completions in the reservoir on the basis of ⅓ to the individual wells and ⅔ in accordance with acreage, resulted in the unlawful confiscation of gas belonging to the large tract owners. This appropriation and conversion by the town lot owners was therefore held unlawful and void. This holding was reiterated in *Railroad Commission of Texas* v. *Shell Oil Co.*, 380 S.W. 2d 556 (Tex. 1964).

The rationale of these holdings is that the ⅓-⅔ allocation formula contained in the Railroad Commission regulation is void because it results in confiscating the property of the large tract owners and appropriating it to the use of the town lot operators and thereby takes the property of the large tract owners without due process of law and denies them the equal protection of the laws in violation of

the provisions of the Fourteenth Amendment to the Constitution of the United States. The rationale of these decisions is stated by Hardwicke & Woodward in *"Fair Share and the Small Tract in Texas"*, 41 Texas L. Rev. 75, 80, as follows:

> "It is invalid because it results in the taking or confiscation of property of Smith and giving it to another without due process of law. Besides denying due process of law, such an order denies equal protection of the laws, contrary to the provisions of the Fourteenth Amendment to the Federal Constitution, and to the provisions of Article I, Sections 3 and 19 of the Constitution of Texas."

The authors further state the principle at 41 Texas L. Rev. 83 as follows:

> "It follows that the Legislature in Texas cannot validly legislate to authorize confiscation of property, or take away, or authorize an administrative agency to take away, for the benefit of another, rights inherent in ownership of land or oil, gas, or other minerals. These rights, subject to reasonable regulation to prevent waste, are protected by state and federal constitutions. Of course, the right of condemnation exists if the property is for the use of the public and if compensation is paid; *but there is no right by statute, or regulation under a statute, to take the property of one person and give it to another.*"

The ⅓-⅔ allocation formula in effect under the Railroad Commission rules applicable to the Appling Field has always resulted in and continues to result in the confiscation of vast quantities of Petitioners' gas and its appropriation to the use of Respondents. Accordingly, in still another earlier action between substantially the same parties now before this Court and involving these same gas reservoirs, these Petitioners attacked the validity of the

allocation formula on the basis of the *Atlantic* and *Halbouty* cases and on the basis of what had been said in the *Benz-Stoddard* case. While finding that great quantities of Petitioners' gas were being confiscated by Respondents and converted to their own use, the Supreme Court of Texas nevertheless held that Petitioners "were precluded by lapse of time" from attacking the admittedly confiscatory and otherwise invalid allocation formula under which Respondents were admittedly draining and confiscating large quantities of Petitioners' gas. *Railroad Commission* v. *Aluminum Company of America*, 380 S.W. 2d 599 (Tex. 1964). In so holding, the Texas Supreme Court said in part:

> "The grounds of the attack are that this order results in and permits enormous drainage to town lot and other small tract wells from under Respondents' lands and that this drainage will continue unless the Commission's order is set aside. Alcoa et al assert that they own approximately 3,700 acres of the total productive area of the Middle Kopnicky reservoir and as of June 30, 1961, had 22 wells producing therefrom; that at the same time there were 30 town lot wells with total assigned area of 25 acres; that the average per well allowable for the small tracts is 43 times the average per acre allowable for the standard unit tracts in the Middle Kopnicky. *These allegations are proven without substantial dispute* . . . .
>
> "The Appling Field consists of 10 separate sands for the most part overlying one another. All of these sands produce gas and condensate with a few small oil reservoirs interspersed. The principal sand known as the Middle Kopnicky is the deepest producing sand and by far the thickest and most prolific reservoir. It contains 80% of the gas reserves in the entire area. The nine other sands are progressively higher and overlie the producing area of the Middle Kopnicky . . . ." 380 S.W. 2d at 600. (Emphasis supplied.)

The Middle Kopnicky gas reservoir referred to in the quotation immediately above is the deepest and by far the largest and most productive reservoir in the Appling Field; it originally contained more than 360 billion cubic feet of gas. The Middle Kopnicky and four overlying reservoirs are the five reservoirs covered by the Railroad Commission's order invalidated by the Supreme Court of Texas and here in issue. These four overlying reservoirs originally contained only between three and four and one-half billion cubic feet of gas. Petitioners' leases cover more than 85% of the productive area of the Middle Kopnicky and approximately 90% of the productive area of the other four reservoirs (Tr. 231, 32). Respondents hold leases on only infinitesimal parts of the productive area of these five reservoirs (Tr. 77).

Despite these facts Respondents were enabled to continue their confiscation of Petitioners' gas by this earlier decision barring Petitioners from attacking the allocation formula because of their delay in instituting suit. Since this decision the confiscation of Petitioners' gas has been enormously increased by the development of two new facts:

(1) Respondents, through the well connections in totally depleted, overlying reservoirs in their multiple completion wells, fraudulently drained and converted Petitioners' Middle Kopnicky gas by means of well bore communication between the underlying Middle Kopnicky Reservoir and the overlying depleted reservoirs; and

(2) This enabled Respondents to make Producers' Forecasts to the Railroad Commission based on the total producing capacity of their town lot wells even though gas could be produced at these capacities from these town lot wells only by draining and converting gas from the larger and higher pressure Middle Kopnicky Reservoir and pro-

ducing the same through Respondents' well completions in the overlying and depleted reservoirs (Tr. 233, 35).

The monthly reservoir allowables fixed by the Railroad Commission for these reservoirs on the basis of the entire total of all Producers' Forecasts resulted in individual well allowables to wells on the large tracts in excess of their productive capacity and in excess of the productive capacity of any other well in the field, with such excess under the Railroad Commission's field rules being assigned to the Respondents' town lot wells, thereby permitting them to drain still greater quantities of Petitioners' gas. For example, the Appling Field Segment 5, 7500' Field, in July 1964, had 18 wells completed therein, including 17 town lot wells of Respondents located on a total acreage of 7.132 acres and one large tract well of Petitioners situated on a 328 acre unit. The aggregate reported delivery capacity of all 18 wells was approximately 898,000 MCF per month and, due to the Producers' Forecasts made by Respondents at the maximum producing capacity of their wells, a total allowable of approximately 880,000 MCF of gas was determined to be the "lawful market demand" and hence the reservoir gas allowable for the field for the month of July 1964. The ⅓-⅔ allocation formula resulted in an allowable to Petitioners' large tract well of 591,000 MCF per month which was *more than three times the maximum producing capacity of any well in the field.* 530,000 MCF of gas that this large tract well was unable to produce was allotted under Commission procedure to Respondents' 17 town lot wells, enabling them to confiscate and convert to their own use that amount of Petitioners' gas in a single month! (Tr. 65)

This 530,000 MCF of gas was produced by Respondents not *from* the Appling Segment 5, 7500' Field, for which the allowable was granted but which had long since been

completely depleted, but *from* the Middle Kopnicky reservoir *through* the Appling Segment 5, 7500' Field reservoir by means of well bore communication through which the latter drained gas from the former!

Petitioners could not protect themselves from this plundering of their gas reserves by drilling additional wells on their acreage because the Railroad Commission Rule 37 limited them to one well on each 320 acre unit. Ironically, Respondents were granted drilling permits under exceptions to Rule 37 that allowed them to drill gas wells on their 1/10 acre town lots in order to prevent the "confiscation" of their gas. Petitioners could not obtain relief from the pillaging of their property by petitioning the Railroad Commission for modification of the ⅓-⅔ allocation formula governing individual well allowables, e.g., converting to a straight acreage basis or a reduced percentage to the well and an increased percentage to the acreage, because the ⅓-⅔ allocation formula had been judicially frozen against Petitioners by the Texas Supreme Court decision in *Railroad Commission* v. *Aluminum Company of America*, 380 S.W. 2d 599 (Tex. 1964). Petitioners' only recourse was to seek an order from the Railroad Commission placing some rational ceiling on the ghastly inflated monthly reservoir allowables. Petitioners sought this relief by petition to the Commission.

Finding that the ⅓-⅔ allocation formula was being irrationally distorted and in effect nullified, and that the Respondents' town lot wells were receiving far more than the share of the reservoir allowable they should have received even under the ⅓-⅔ allocation formula, which was already so confiscatory as to be invalid, the Railroad Commission entered an order to reduce the distortion in reservoir gas allowables and to minimize the confiscation of Petitioners' gas by setting the maximum limit on the month-

ly gas allowable for each reservoir in such an amount that if the well with the highest productive capacity in the reservoir were situated on the largest tract, it could produce the individual well allotment which it would receive under the ⅓-⅔ allocation formula (Tr. 72-75).

Respondents as plaintiffs and intervener plaintiffs filed this action to invalidate and to enjoin the enforcement of this order against the Railroad Commission of Texas as defendant. Petitioners intervened as parties defendant (Tr. 29, 89, 96, 153, 283). Petitioners and the Railroad Commission of Texas filed a motion for summary judgment (Tr. 40), which motion was overruled by the district court, to which order and ruling Petitioners and the Railroad Commission of Texas duly excepted (Tr. 169). Respondents filed a motion for summary judgment (Tr. 172), which the Railroad Commission of Texas and the Petitioners answered on the law and on the facts supported by affidavits (Tr. 230, 233, 239, 252).

Petitioners and the Railroad Commission of Texas predicated their motion for summary judgment upon allegations of and upon detailed factual affidavits establishing the confiscation of vast quantities of Petitioners' gas by Respondents through well bore communication, through making producers' forecasts for and receiving individual well allotments for reservoirs in multiply completed wells which in fact had long since been completely depleted, and through the reallocation to Respondents of the amounts of the individual well allocations given Petitioners' wells which were in excess of the maximum productive capacity of those wells. Again in answer to Respondents' motion for summary judgment Petitioners and the Railroad Commission of Texas filed a pleading which described the facts of confiscation of Petitioners' gas which justified and formed the basis for the Railroad Commission order under

attack and described in detail the accompanying affidavit proof of the facts of this confiscation. The answer to Respondents' motion for summary judgment alleged in summary:

> "These affidavits show the tremendous confiscation of Alcoa, et al's, gas which was taking place when 'reasonable market demand' was being determined under Statewide Rule 31. The instant Order is a special field rule designed to correct that situation." (Tr. 227)

Extracts from the affidavit proof of the facts of confiscation are printed herewith as Appendix H.

Respondents' motion for summary judgment was granted by the District Court with final judgment being entered decreeing that said ruling and order of the Railroad Commission was null and void and illegal, and was thereby set aside, and the Railroad Commission was permanently enjoined from enforcing or attempting to enforce said order (Tr. 288). From this judgment the Railroad Commission and Petitioners perfected a direct appeal to the Supreme Court of Texas (Tr. 295). In their briefs in the Supreme Court of Texas the Railroad Commission and the Petitioners developed and argued the facts of confiscation of Petitioners' gas and its appropriation to Respondents' use which occurred under the Railroad Commission's prior order (Statewide Rule 31) and which created the basis justifying and supporting the corrective order under attack. The most pertinent extracts from the affidavits proving the facts of confiscation were reproduced in the appendix to Petitioners' brief in the Texas Supreme Court.

The majority opinion of the Supreme Court of Texas found *the confiscation of Petitioners' gas in vastly increased amounts prior to the Railroad Commission's corrective order to be a fact,* but it nevertheless held that under Section 12 of Article 6008 the Railroad Commission was without power to accord any protection to the Petitioners' correla-

tive rights or to reduce the confiscation of Petitioners' gas in fixing monthly reservoir allowables. It held in essence that the Railroad Commission was required to fix the monthly reservoir allowable or "the lawful market demand" at the total amount of gas that could be sold from the reservoir during the month for lawful end uses even though this resulted in, and such "lawful market demand" could only be satisfied by, the drainage and confiscation by well bore communication and otherwise of Petitioners' gas and its appropriation to the use of respondents.

The majority opinion, at 405 S.W. 2d 313 (Appendix D, p. 9a), found the fact of increased confiscation of Petitioners' gas as follows:

> "The small tract wells have delivery capacities similar to those of the wells located on large tracts. A 1961 study disclosed that drainage was taking place from the Middle Kopnicky to the smaller upper zone sands through well bore communication in the wells with multiple completions. This well bore communication distorted the producing capability of the upper zone well completions and thus enabled the operators to file forecasts far in excess of what the true delivery capacity of the wells would have been in the absence of such communication. It had that effect because, as pointed out above, the amounts of the forecasts are limited only by the delivery capacities of the wells.
>
> "*The 1/3-2/3 allocation formula in itself gave the small tract wells a tremendous drainage advantage over the larger gas units.* Prior to the adoption of the order now in question, the Commission determined that operators of many wells on small tracts were following the practice of filing forecasts at or near the full delivery capacity of their wells. These forecasts, when combined with those filed by other operators and handled in accordance with the usual Commission procedure outlined in Statewide Rule 31, resulted in the assignment of very large reservoir allowables. The

> reservoir allowables were so great that the large tract wells, even though they had normal or even maximum delivery capacities, were incapable of producing the allowables representing their fair share of the gas as determined by the allocation formula. They were accordingly classified as limited capacity wells and assigned the maximum allowables they were capable of producing; the remainder of the allowables to which they were entitled under the allocation formula was reallocated among the town lot wells. This enabled the latter to produce *far more of the reservoir allowable than their share as determined by the basic ⅓-⅔ allocation formula, and the drainage advantage which the small tract operators already enjoyed by virtue of the formula itself was thus substantially enhanced.*" (Emphasis supplied.)

As the dissenting opinion of Justice Hamilton so forcefully puts it:

> "The Court's opinion graphically sets out the mass confiscation of property and the gross injustice that results from an enforcement of Rule 31 prior to the amendment that is under attack here." (App. F, p. 32a).

Petitioners and the Railroad Commission of Texas pointed out in their motion for rehearing in the Texas Supreme Court that there could not be a more graphic description of the unconstitutional confiscation of Petitioners' gas without compensation and without due process of law and of the denial to Petitioners of the equal protection of the laws than set out in the above quoted extract from the majority opinion. In their motion for rehearing and in a supplemental brief in support of such motion the Railroad Commission and the Petitioner made and developed the point that the construction of Section 12 of Article 6008 as requiring the Railroad Commission to fix "lawful market demand" and the monthly reservoir allowable in a manner and in such amounts as resulted in and required this confiscation neces-

sarily rendered the statute as construed and as applied violative of the due process and equal protection clauses of Amendment 14 to the Constitution of the United States.

Prior to the majority opinion of the Supreme Court of Texas handed down on June 22, 1966, there had been no fact finding of confiscation as described above coupled with a construction of Section 12 of Article 6008 as not only permitting but requiring such confiscation. It was the first such finding and construction, made casually and without constitutional qualm, in this case or in history. Hence, the motion for rehearing in the Supreme Court of Texas was the first occasion and the first opportunity for the full development of the patent unconstitutionality of Section 12 of Article 6008 under such fact findings coupled with such construction and application of the statute. (Motion for Rehearing is Record Item 8.) In that motion the second point of error was:

> "Section 12 of Article 6008 as construed and applied by the majority opinion is unconstitutional under Article 1, Sections 3 and 19 of the Constitution of the State of Texas and the Fourteenth Amendment of the Constitution of the United States of America in that it denies to Appellants the equal protection of the law and results in the confiscation and taking of the property of Appellants without compensation and without due process of law."

A detailed brief in support of such motion was also filed. (Record Item 10.) The Texas Supreme Court overruled this motion without discussion. (App. C)

Reasons for Granting the Writ

The rather lengthy Statement Of The Case necessary to put the Question Presented before the Court in proper posture and focus has inherent within it the reasons why the

writ should be granted. The finding on uncontroverted evidence in the majority opinion of the Texas Supreme Court that producers' forecasts by Respondents, predicated upon the drainage of Petitioners' gas from the Middle Kopnicky Reservoir by means of well bore communications and the production of that gas through the overlying, totally depleted reservoirs, resulted through the application of the Appling Field rules in individual well allotments to Respondents which enables them "to produce *far more* of the reservoir allowable than *their share* as determined by the basic ⅓-⅔ allocation formula, and the *drainage advantage which the small tract owners already enjoy by virtue of the formula itself was thus substantially enhanced*" is a stark declaration of the taking of Petitioners' property without compensation and without due process of law and of the denial to Petitioners of the equal protection of the laws. The ensuing holding that Section 12 of Article 6008 not only precludes the Railroad Commission from preventing, but requires it to permit, this "drainage advantage" to be "substantially enhanced" is tantamount to a declaration that the statute as so interpreted and as so applied to Petitioners takes their property without compensation and without due process of law and denies to them the equal protection of the laws and hence is unconstitutional in such construction and application under the Fourteenth Amendment to the Constitution of the United States.

The Texas Supreme Court majority held that this monstrous travesty is inexorably compelled by Section 12 of Article 6008 and cannot be averted by the Commission or the courts despite the express mandate in Section 12 that "the Commission shall then proceed by *proper order* to prorate and regulate the gas production from such reservoir *on a reasonable basis*". Proper? Reasonable? The same majority held that the Commission is powerless un-

der Section 12 to consider the protection of Petitioners' correlative rights and the prevention of the admitted gross confiscation of Petitioners' gas in determining the "monthly reservoir allowable" despite the express command of Section 12 that: "The monthly reservoir allowable shall be allocated among all wells entitled to produce gas therefrom *so as to give each well its fair share of the gas to be produced from the reservoir* . . ." Yet the majority opinion expressly finds that its construction of Section 12 gives Respondents *"far more of the reservoir allowable than their share"* and that the *"drainage advantage"* which Respondents *"already enjoy by virtue of the formula itself was thus substantially enhanced"!* Yet this gross and garish miscarriage of justice is given judicial imprimatur as immutable and beyond correction by Commission or court. The majority opinion totally ignores the fact that its construction of Section 12 requires a reservoir allowable *which renders it totally impossible* for Petitioners to receive their "fair share of the gas to be produced from the reservoir". Perhaps this Court cannot heed state court construction so impervious to the express mandate of the state statute. But surely this Court will not ignore a state court statutory construction so oblivious to the denial of equal protection and due process so agonizingly present in its own express language.

Acting directly contrary to the command of this Court's decision in *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U.S. 573 (1940), that the courts should accord the Railroad Commission the widest latitude and the broadest discretion in prorating and regulating the production and flow of oil and gas, the majority opinion gives § 12 of Article 6008 a narrow, rigid, mechanistic contruction that precludes the Commission from limiting reservoir gas allow-

ables to amounts of gas *lawfully produced.* The dissenting opinion of Mr. Justice Hamilton states the consequence:

> "In view of this holding of the Court there is no way in which the Commission can protect correlative rights. If Woods Exploration Company and a small pipe line can destroy correlative rights in the reservoirs in question it is unthinkable what larger pipe lines can do to gas fields all over this state wherever there are small tract owners located.
>
> "The Court said in effect that the Legislature gave broad powers to protect correlative rights to the Commission throughout the statutes on oil and gas but took it away with one stroke of the pen when it wrote this one phrase 'shall determine (1) the lawful market demand for gas to be produced from each such reservoir during the following month; * * *'. This in spite of the fact that the Legislature nowhere told the Commission what it must or must not consider in determining lawful market demand. The effect of this holding is to destroy, insofar as gas fields in which there are small tract owners are concerned, the power of the Commission to protect correlative rights. This Court has said numerous times contrary to the present ruling that the Commission has broad powers in so prorating and regulating oil and gas production as to protect correlative rights." App. F, p. 40a.

The majority construction of Section 12 of Article 6008 renders it unconstitutional because, as Mr. Justice Hamilton's dissent puts it, it does not confine Respondents to forecasting and producing "their own gas" but in addition permits them to "produce and sell more than ten times that much more gas belonging to his neighbors" by forecasting and receiving allowables for production of "the gas of other owners, which the producers had no right to offer for sale or to produce".

The United States Supreme Court settled at an early date under the very first Texas oil and gas proration regu-

lations in *Sterling* v. *Constantin*, 287 U.S. 378, 395 (1932), that the right to the use and enjoyment of oil and gas properties "subject to reasonable regulation by the State in the exercise of its power to prevent unnecessary loss, destruction, and waste is protected by the due process clause of the Fourteenth Amendment". It declared that a judicial remedy will be accorded "when there is a substantial showing that the exertion of state power has overridden private rights secured by the Constitution". Section 12 of Article 6008 as interpreted and applied by the majority opinion has overridden the private rights of petitioners in the gas belonging to them and located under their lands and it has not done so to prevent waste.

A particularly persuasive precedent is *Thompson* v. *Consolidated Gas Util. Corp.*, 300 U.S. 55 (1936). The opinion by Mr. Justice Brandeis affirmed a United States District Court judgment holding invalid and enjoining the enforcement of a gas proration order issued by the Railroad Commission of Texas. Pursuant to a Texas statute on the subject, the Railroad Commission had issued a gas proration order limiting the production of sweet gas from the plaintiffs wells to an amount below their marketing requirements under existing contracts, below their existing production, and below the capacity of their transportation and marketing facilities. The plaintiffs owned private pipe lines in which they transported gas produced from their own wells. Their pipe lines were not common carrier pipe lines. There were other gas wells in the field that were not served by pipe lines and had to dispose of their gas for inferior uses. It was found that the Railroad Commission order was not to prevent waste or to protect correlative rights of co-owners in the common reservoir "but solely to compel the plaintiffs, and others similarly situated, to purchase gas from those well owners who have not provided themselves with

a market and marketing facilities". It was further found that the gas lands of the pipe line owner plaintiffs were being drained by the wells of the non-pipeline owners. In holding that the statute and the gas proration order constituted an unlawful taking of plaintiffs' property without due process of law, including the resulting increased drainage of plaintiffs' gas, the court stated in part:

> "The order disables the plaintiffs from performing their contracts except by means of purchases. Resort to those means necessarily results in depriving the plaintiffs of property. Under each statute, if obeyed, the State takes from the pipe line owner the money with which the purchase is made, the money lost through curtailed use of properties developed at large expense, *the money lost because of the drainage away from his land of the gas which he is forbidden to use for himself, but must buy from those toward whose land it migrates.*
>
> "Our law presents no more glaring instance of the taking of one man's property and giving it to another." 300 U.S. at 79. (Emphasis supplied.)

It is respectfully submitted that the instant case *does* present a "more glaring instance of the taking of one man's property and giving it to another".

In the *Thompson* case the Court further stated:

> "And this Court has many times warned that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." 300 U.S. at 80.

The Supreme Court in that case stated the general rule as follows:

> "But, obviously, the proration orders would not be valid if shown to bear no reasonable relation either to

> the prevention of waste or the protection of correlative rights, or if shown to be otherwise arbitrary." 300 U.S. at 80.

The application of Section 12 of Article 6008 made by the majority opinion so as to protect and perpetuate the "substantial enhancement" of drainage from petitioners' lands and the giving to Respondents of "far more of the reservoir allowable than their share" obviously bears no reasonable relation either to the prevention of waste or to the protection of correlative rights, but on the contrary is utterly destructive of the correlative rights of the petitioners and is totally arbitrary. Hence, as so applied, it is unconstitutional. When Section 12 of Article 6008 is stricken, the validity of the market demand order is clearly sustainable under Sections 1, 10, and 22 of the statute as permitted by the separability clause in Section 26 of the statute. The court stated the applicable principle in the *Thompson* case as follows:

> "Those benefits result incidentally from the enactment of other provisions of the Act, the constitutionality of which is not questioned, and which seem clearly separable from the sections here challenged." 300 U.S. at 81.

The Supreme Court of Texas itself long ago recognized that a Railroad Commission order which permitted one producer's gas to be drained and confiscated by another producer contravened the Fourteenth Amendment to the Constitution of the United States in *Marrs* v. *Railroad Commission,* 142 Tex. 293, 177 S.W. 2d 941 (1944), in which case the Court said:

> "Every owner or lessee is entitled to a fair chance to recover the oil or gas in or under his land, or their equivalent in kind, and any denial of such fair chance amounts to confiscation. * * * The Fourteenth Amendment to our Federal Constitution provides that no state

> shall deprive any citizen of his property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. We need not here determine to what extent the State may confiscate one's property, or deprive him of the use thereof, without compensation, where this is necessary in order to conserve the natural resources of the State. * * * It is sufficient to point out that the trial court here found that the drainage complained of was not necessary in order to avoid waste, and that finding is supported by the evidence. It was further found that the orders of the Railroad Commission were unreasonable, unjust, and discriminatory.
>
> "This Court has many times said that the Railroad Commission cannot indulge in unjust, unreasonable, or arbitrary discrimination between different oil fields, or between different owners in the same field." 177 S.W. 2d at 948, 949.

A writ should be granted in this case not only because Section 12 of Article 6008 has been so construed as to permit, or indeed to require, the confiscation of Petitioners' property, but because the decision weakens and disrupts the entire regulatory system applicable to the Texas oil and gas industry which has been reposed in the broad and general discretion of the Railroad Commission since the decision of this Court in the *Rowan & Nichols* case. As Mr. Justice Smith describes it in his dissenting opinion the majority decision "effectively withdraws from the Commission the power granted it by the Legislature to consider correlative rights in establishing a reasonable reservoir allowable" and "the result reached is destructive in that it takes from the Commission every semblance of power that this Court has in past decisions recognized that it possessed" (App. E, p. 20a).

The impact of the majority decision goes far beyond the unconstitutional confiscation of the property of these par-

ticular petitioners because, as Mr. Justice Smith's dissent states, the majority holds "that the Railroad Commission has *no power* to consider the protection of correlative rights or to employ methods designed to see that each individual well gets its *fair share* of the total production from the common gas reservoir in fixing allowables". This drastic narrowing of the powers of the Railroad Commission, contrary to the decision of this Court in the *Rowan & Nichols* case and numerous prior decisions of the Supreme Court of Texas, will permit the confiscation of the gas of large tract owners under Railroad Commission sanction pursuant to state statutory mandate anywhere that large tract owners and small tract owners have wells producing from a common gas reservoir.

Conclusion

The majority opinion bluntly and expressly admits two prior injustices to Petitioners, the first when Respondents were permitted "to make multiple completions from a single well bore" in all gas sands underlying their town lots even though production from a single sand enabled them "to recover more than the quantity of gas" under their land, *Benz-Stoddard* v. *Aluminum Company of America,* 368 S.W. 2d 94 (Tex. 1963), and the second injustice when Petitioners "were precluded by lapse of time from attacking the ⅓-⅔ formula established by the Commission for allocating production from the field, even though using the formula allowed the wells on small tracts to drain substantial quantities of gas from the larger units". *Railroad Commission* v. *Aluminum Co. of America,* 380 S.W. 2d 599 (Tex. 1964).

The majority opinion then expressly finds under the undisputed facts that the subsequent developments of extensive drainage through well bore communication and the

reallocation to Respondents of that part of Petitioners' distorted individual well allowables in excess of their producing capacity enabled Respondents "to produce far more of the reservoir allowable than their share as determined by the basic ⅓-⅔ allocation formula", and that "the drainage advantage" which Respondents "already enjoy by virtue of the formula itself was thus substantially enhanced". The majority opinion makes no contention that Petitioners are "precluded by lapse of time" from attacking confiscation resulting from drainage through well bore communication and from reallocation of distorted allowables since these factors were subsequent developments that were not even before the court in *Railroad Commission* v. *Aluminum Co. of America, supra.* The majority simply holds that Section 12 of Article 6008 precludes the Railroad Commission from protecting Petitioners' correlative rights in fixing reservoir allowables and requires the Commission to fix the amount of the reservoir allowable at the full amount that can be produced and sold from the reservoir during the month for lawful end uses — even though that amount can be produced and sold only by permitting Respondents to produce and sell enormous quantities of Petitioners' gas. This is simply a classic case of construing and applying a statute so as to take Petitioners' property without due process of law and of the denial to Petitioners of the equal protection of the laws.

The impact of this decision upon powers and discretion historically accorded to the Commission and its drastic and far-reaching impact upon the entire gas industry and upon every large tract owner producing from a common reservoir with small tract owners warrant the granting of a writ, It is further warranted in vindication of the constitutional rights of these Petitioners to the end that they may not be compelled to endure without remedy yet an-

other, and a third, time an admitted "grave injustice" involving these same Respondents and these same gas reservoirs.

Respectfully submitted,

.....

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October 21, 1966

Certificate of Service

Copies of this Petition for Writ of Certiorari have been mailed, properly stamped and addressed, to Honorable Price Daniel, 810 Brown Building, Austin, Texas, Honorable Levert J. Able, 1001-711 Main Building, Houston, Texas, Honorable William E. York, 1015 Pecan, McAllen, Texas, and Honorable Charles F. Herring, 906 Perry-Brooks Building, Austin, Texas, attorneys of record for the Respondents at their addresses of record.

.....

Attorney for Petitioners

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APPENDIX A

No. 142,040

WOODS EXPLORATION AND PRODUCING COMPANY, INC. ET AL. v. RAILROAD COMMISSION OF TEXAS	In the District Court of Travis County, Texas 53rd Judicial District

FINAL JUDGMENT

On the 26th day of April, 1965, came on for consideration the Motion for Summary Judgment filed by the Plaintiffs, Woods Exploration & Producing Company, Inc. and Southeastern Pipeline Company, and the Intervenors, Ben Novak and Claire Benz-Stoddard, aligned with the Plaintiffs, and all parties, Plaintiffs, Defendant and Intervenors appeared through their respective attorneys of record, and leave was granted to the Lumar Gas Corporation to intervene by agreement of the parties. Whereupon, the Court considered the Motion for Summary Judgment filed herein by the Plaintiffs and Intervenors aligned with them as aforesaid and the Answer thereto by the Railroad Commission of Texas, Defendant, and the Aluminum Company of America, Crown Central Petroleum Corporation and Pocantico Oil & Gas Corp., together with the instruments, affidavits and pleadings of the parties filed herein in connection with the Defendant's Motion for Summary Judgment, overruled by Order dated April 13, 1965, which it was in open court stipulated by all parties could be so considered by the Court in connection with this Motion; and after hearing the arguments in open court and considering the Motions for Sum-

mary Judgments and the Answers thereto and affidavits submitted in connection therewith and the sworn pleading of the Plaintiffs and stipulations of the parties filed for record herein, the Court is of the opinion and so finds that there is no dispute on the material issues of facts in this case, and that the law and the undisputed facts are with the Plaintiffs and the Intervenors aligned with them and against the Defendant and the Intervenors aligned with the Defendant, and that the ruling of the Railroad Commission on November 4, 1964 and the formal order thereon by the Railroad Commission dated February 1, 1965, being Special Order #2-53,009, effective December 1, 1964, adopting a new procedure for determining the maximum limit on the daily reasonable market demand from the five gas reservoirs, being Appling (Seg. 5) 7500′ field, and the Appling (Seg. 6) 7500′ field, the Appling (Seg. 6) 7600′ field, the Appling (Seg. 6) 7600′ lower field, and the Appling (Seg. A) Middle Kopnicky Field, situated in Calhoun County, Texas, is not within the statutory authority of the Railroad Commission under Sections 10, 11, and 12, Article 6008, R.C.S. and the undisputed facts and is therefore null and void.

It is therefore ORDERED, ADJUDGED and DECREED that the ruling of the Railroad Commission on November 4, 1964 and the Special Order thereon of the Defendant Railroad Commission, dated February 1, 1965, being Special Order #2-53,009, is null and void and illegal and has no just basis in law or in fact, and is hereby set aside.

It is further ORDER, ADJUDGED, and DECREED that the Defendant Railroad Commission of Texas and its members, Ben Ramsey, Jim Langdon and Byron Tunnell, and their agents, servants, and employees are permanently enjoined from enforcing or attempting to enforce said Order

dated February 1, 1965, being Special Order #2-53,009, and the ruling preceding the same, dated November 4, 1964, effective December 1, 1964.

It is further ORDERED, ADJUDGED and DECREED that Plaintiffs and Intervenors aligned with Plaintiffs have and recover of the Defendant and of the Defendant Intervenors herein all costs of suit, for which let execution issue.

To which Judgment of the Court Defendant and Defendant Intervenors then and there in open court duly accepted and gave notice of appeal.

SIGNED and ENTERED of record this the 26th day of April, 1965.

/s/ HERMAN JONES
Herman Jones
District Judge

APPENDIX B

SUPREME COURT OF TEXAS

June 22, 1966

No. A-10,825.

RAILROAD COMMISSION OF TEXAS ET AL. v. WOODS EXPLORATION AND PRODUCING COMPANY, INC. ET AL.	Direct Appeal from Travis County

This cause came on to be heard on direct appeal from the 53rd District Court of Travis County, Texas, and the original transcript and briefs and arguments of counsel having been duly considered, because it is the opinion of the Court (Associate Justices Smith, Norvell and Hamilton dissenting) that there was no error in the judgment of the District Court, signed and entered on the 26th day of April, 1965, it is, therefore, *ordered, adjudged* and *decreed* that the judgment of the District Court be, and hereby is, affirmed.

It is further ordered that appellants, Railroad Commission of Texas, (and the members thereof in their official capacities) Aluminum Company of America, Crown Central Petroleum Corporation and Pocantico Oil & Gas Corporation, pay all costs in this cause expended and incurred in this Court, and that this decision be certified to the District Court of Travis County, Texas, for observance.

APPENDIX C

IN THE SUPREME COURT OF TEXAS
AUSTIN

July 27, 1966

No. A-10,825.

RAILROAD COMMISSION OF TEXAS ET AL. v. WOODS EXPLORATION AND PRODUCING COMPANY, INC. ET AL.	Direct Appeal from Travis County

Appellants' motion for rehearing, filed in the above numbered and entitled cause on June 29, 1966, having been duly considered, it is ordered that said motion be, and hereby is, overruled.

APPENDIX D

IN THE SUPREME COURT OF TEXAS

No. A-10,825

RAILROAD COMMISSION OF TEXAS ET AL. *Appellants* v. WOODS EXPLORATION AND PRODUCING COMPANY, INC. ET AL. *Appellees*	On Direct Appeal from Travis County, Texas

This is another controversy between operators with wells on large tracts and those with wells on small tracts in the Appling Gas Field in Calhoun and Jackson Counties. Substantially the same parties have been before us on two previous occasions. In the first case it was held that each of the vertically separated reservoirs underlying the Field was to be considered as a separate reservoir in determining the right to a Rule 37 exception. The action of the Railroad Commission in allowing a small tract operator to make multiple completions from a single well bore in the gas sands under her property was upheld, even though production from one sand would have enabled her to recover more than the quantity of gas under her land. Benz-Stoddard v. Aluminum Company of America, Tex. Sup. 368 S.W. 2d 94. In the second case it was held that the large tract operators were precluded by lapse of time from attacking the ⅓-⅔ formula established by the Commission for allocating production from the field, even though use of the formula allowed the wells on small tracts to drain substantial quantities of gas from the larger units.

Railroad Commission of Texas v. Aluminum Company of America, Tex. Sup., 380 S.W. 2d 599. The question to be decided now is whether the Commission may, for the purpose of protecting correlative rights, establish a ceiling on the monthly allowable of gas to be produced from a reservoir.

By Special Order No. 2-53,009 dated February 1, 1965, the Commission prescribed a formula to be used in determining the maximum reasonable market demand for five reservoirs in the Appling Field. This suit was instituted by Woods Exploration & Producing Co., Inc. et al against the Commission to test the validity of the order and enjoin its enforcement. Ben Novak and others who are interested in small tract wells intervened as plaintiffs, while Aluminum Company of America and other large tract operators intervened and aligned themselves with the Commission. After the trial court rendered summary judgment in favor of the plaintiffs, declaring the order invalid and enjoining the Commission from enforcing the same, the Commission and the large tract operators prosecuted a direct appeal to this Court as authorized by Article 1738a.[1]

The question presented for decision is relatively narrow, but a rather full statement is necessary to an understanding of the contentions made by the parties. Section 12 of Article 6008 provides that the Commission shall fix the monthly allowable of gas to be produced from a reservoir "at the lawful market demand therefor or at the volume that can be produced from such reservoir without waste, whichever is the smaller quantity." It then directs that the monthly reservoir allowable be allocated among the wells entitled to produce from the reservoir so as to give each

[1] All statutes are referred to by the article number under which they appear in Vernon's Annotated Texas Civil Statutes.

well its fair share of the gas to be produced, with the proviso that each well shall be restricted to the amount of gas that can be produced without waste. These and other provisions of Article 6008 will be adverted to later in this opinion.

The usual procedure for fixing the monthly gas allowable for a reservoir is set out in Statewide Rule 31. Under its provisions market demand is ordinarily determined primarily on the basis of Producers' Forecasts filed with the Commission by operators having wells completed in the reservoir. These nominations state the volume of gas which each producer expects to be able to market from his wells the following month, and an operator may forecast any amount he desires provided it does not exceed the delivery capacity of his wells. If the Commission concludes that use of the forecasts does not result in a correct determination of reasonable market demand for the reservoir, it takes into account other pertinent facts such as average production for the previous twelve months or nominations filed by purchasers of gas. The power to do so is expressly recognized by Statewide Rule 31.

Under the provisions of Article 6008 mentioned above and where waste is not involved, market demand as determined by the Commission becomes the monthly reservoir allowable. The allocation formula applicable to the field is then used to divide the reservoir allowable among the wells entitled to produce from the reservoir. In the case of the Appling Field, this is the ⅓-⅔ formula we refused to strike down in Railroad Commission of Texas v. Aluminum Company of America, supra. Subject to any inequities inherent in the allocation formula, each well thus receives its fair share of the gas produced provided all wells are capable of producing their allowables. A well incapable of producing the allowable that would normally be assigned to it is

known as a limited capacity well. Under prevailing Commission procedures, limited capacity wells are assigned the maximum allowables they can produce, and the remainder of the allowables they would otherwise be entitled to receive are allocated to other wells in the field.[2] This brings us to the problem dealt with by the Commission in its Special Order No. 2,53,009. There is no dispute as to any of the material facts. Waste is not involved in the case, and there is nothing in the record to suggest that any gas produced from the Appling Field has been devoted to unlawful uses.

As indicated above there are a number of vertically separated reservoirs in the Appling Field. Five of these reservoirs are covered by the Commission's order here in issue. One of them, the Middle Kopnicky, is the deepest and by far the largest and most productive reservoir in the Field. It originally contained more than 360 billion cubic feet of gas. Each of the other four reservoirs covered by the order overlies the Middle Kopnicky and originally contained between 3 and 4½ billion cubic feet of gas. Under Rule 37 exceptions granted by the Commission, appellees and other town lot lessees were permitted to drill numerous wells on small tracts, most of them containing approximately 1/10 of an acre, and to make multiple completions from a single well bore in each of the several reservoirs underlying their lots.

The small tract wells have delivery capacities similar to those of the wells located on large tracts. A 1961 study disclosed that drainage was taking place from the Middle Kopnicky to the smaller upper zone sands through well bore communication in the wells with multiple completions. This

[2] Appellees say, and appellants do not deny, that this method of determining the amount each well may produce is expressly sanctioned and required by the provisions of Rule 5, which established the ⅓-⅔ allocation formula for the Appling Field.

well bore communication distorted the producing capability of the upper zone well completions and thus enabled the operators to file forecasts far in excess of what the true delivery capacity of the wells would have been in the absence of such communication. It had that effect because, as pointed out above, the amounts of the forecasts are limited only by the delivery capacities of the wells.

The ⅓-⅔ allocation formula in itself gave the small tract wells a tremendous drainage advantage over the larger gas units. Prior to the adoption of the order now in question, the Commission determined that operators of many wells on small tracts were following the practice of filing forecasts at or near the full delivery capacity of their wells. These forecasts, when combined with those filed by other operators and handled in accordance with the usual Commission procedure outlined in Statewide Rule 31, resulted in the assignment of very large reservoir allowables. The reservoir allowables were so great that the large tract wells, even though they had normal or even maximum delivery capacities, were incapable of producing the allowables representing their fair share of the gas as determined by allocation formula. They were accordingly classified as limited capacity wells and assigned the maximum allowables they were capable of producing; the remainder of the allowables to which they were entitled under the allocation formula was reallocated among the town lot wells. This enabled the latter to produce far more of the reservoir allowable than their share as determined by the basic ⅓-⅔ allocation formula, and the drainage advantage which the small tract operators already enjoyed by virtue of the formula itself was thus substantially enhanced.

An example will serve to illustrate the problem. One of the reservoirs in the Appling Field is designated as Segment 5, 7500′, and 18 wells were completed therein. Seven-

teen of these wells were located on 7.132 acres, while the remaining well was situated on a 328-acre unit. Since the 17 small tract wells have a large aggregate delivery capacity, their operators were able to make correspondingly large forecasts for the month of July, 1964. The total delivery capacity of all 18 wells was approximately 898,000 MCF per month, and the production forecasts resulted in the determination that reasonable market demand, and hence the reservoir allowable, for the month was approximately 880,000 MCF. Under the basic ⅓-⅔ allocation formula, the large tract well was entitled to an allowable of 591,000 MCF, but the productive capacity of the best well completed in the reservoir was approximately 87,000 MCF per month. The productive capacity of the single large tract well was only about 34,000 MCF, and in accordance with the usual Commission procedures some 557,000 MCF were allocated to the town lot wells for the one month in addition to their shares of the reservoir allowable as determined by application of the ⅓-⅔ formula.

Aluminum Company of America requested the Commission to amend Statewide Rule 31 as applied to the Appling Field by either (1) establishing a formula for computing the maximum quantity of gas that might constitute market demand for a reservoir, or (2) discontinuing the practice of reallocating the excess allowables of limited capacity wells. The Commission chose the first alternative and entered Special Order No. 2-53,009 adopting Field Rule 11, the relevant portions of which are quoted in the margin.[3]

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[3] "Rule 11: a. The reasonable market demand for the Appling, Segment 5, 7500'; the Appling, Segment 6, 7500'; the Appling, Segment 6, 7600'; the Appling, Segment 6, 7600', Lower; and the Appling, Segment 'A' Kopnicky, Middle Fields, Jackson and Calhoun Counties, Texas, shall be allocated to each well in each field in accordance with the allocation formula for such field.

This is the order now under attack. Its effect is to establish as a ceiling on reasonable market demand the quantity of gas which, when fixed as the monthly reservoir allowable, would permit the well on the largest proration unit, if its delivery capacity were equal to the largest delivery capacity of any well in the reservoir, to receive an allowable it would be capable of producing.

It is unnecessary for us to consider some of the arguments advanced by appellees in support of the trial court's judgment. As we view the case, the basic issue is whether the procedure for determining maximum market demand established by Rule 11 is beyond the authority delegated to the Commission by the Legislature in Article 6008. Appellees rely primarily upon the provisions of Section 12 mentioned above. It is their contention that the statute requires the Commission to determine lawful market demand and then, where waste is not involved, set the reservoir allowable at the amount of the market demand so determined. They insist that Rule 11 is invalid because it fixes an arbitrary limit based upon factors which have nothing to do with market demand.

Appellants emphasize Sections 1 and 22 of Article 6008, which provide as follows:

> "Sec. 1. In recognition of past, present, and imminent evils occurring in the production and use of natural gas, as a result of waste in the production and use

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b. The daily reasonable market demand for gas for each of the mentioned fields shall be the lesser gas volume figure as determined *either* by summation of nominated volumes taken from producers' forecasts, *or* by dividing the reported productive capability as shown on the GWT-2 test of the well exhibiting the greatest ability to deliver gas to normal gathering facilities by the participation factor of the largest proration unit.

c. The monthly reasonable market demand for gas shall be determined by multiplying the daily reasonable market demand by the number of days in the month."

thereof in the absence of correlative opportunities of owners of gas in a common reservoir to produce and use the same, this law is enacted for the protection of public and private interests against such evils by prohibiting waste and compelling ratable production.

"Sec. 22. The Commission shall be vested with a broad discretion in administering this law, and to that end shall be authorized to adopt any and all rules, regulations or orders which it finds are necessary to effectuate the provisions and purposes of said law."

They say that the remainder of the statute, and particularly the sections upon which appellees rely, must be construed in the light of these provisions. Since the declared purpose of the law is the protection of public and private interests by prohibiting waste and compelling ratable production, they contend that the Commission may properly consider the protection of correlative rights as one of the relevant factors in determining reasonable market demand. The Commission takes the position, therefore, that reasonable market demand is the total figure that allows each operator to produce his fair and allocated share of gas from a common reservoir within the framework of the exisiting allocation formula. Appellants further insist that the reservoir allowable and the individual well allocations are necessarily intertwined and constitute inseparable parts of a single whole. They point out that a reservoir allowable is not reasonable if it results in unreasonable well allocations, and from this premise they argue that the determination of reasonable market demand must be left to the discretion of the Commission so that unique situations such as that existing in the Appling Field can be handled through special regulation.

Appellants make a strong case for granting the Commission power to consider correlative rights in establish-

ing a reasonable reservoir allowable, but our problem is to determine whether the Legislature has done so. From a reading of Article 6008 and other statutes in pari materia therewith, we agree with appellants that the term "lawful market demand" as used in the third and fourth sentences of Section 12 means reasonable market demand for lawful uses. After considering all the provisions of Article 6008, however, it seems clear to us that the Legislature did not intend to authorize production from a reservoir to be limited to less than reasonable market demand except for the prevention of waste.[4]

Section 10 of the statute makes it the duty of the Commission to regulate daily gas well production "in the manner and method herein set forth." The Commission is then directed in general terms to prorate and regulate produc-

[4] This conclusion is further supported by the history of our oil and gas conservation laws. The first Texas statute prohibited waste and authorized the Commission to "do all things necessary for the conservation of oil and gas." Acts 1919, 36th Leg., p. 285, ch. 155. It was only after extended controversy that the Legislature adopted the so-called "Market Demand Act" in 1932. Acts 1932, 42nd Leg., 4 C.S., p. 3, ch. 2. This was preceded by the "Anti-Market-Demand Act," which provided that waste "shall not be construed to mean economic waste, and the Commission shall not have power to attempt by order, or otherwise, directly or indirectly, to limit the production of oil to equal the existing market demand for oil." Acts 1932, 42nd Leg., 1 C.S., p. 46, ch. 26. Governor Sterling is reported to have declared that he would veto a bill which authorized limitation of production to reasonable market demand, because he was interested only in preventing physical waste and could not see how limitation of production to reasonable market demand would have the effect of preventing waste. See Hardwicke, Legal History of Proration of Oil Production in Texas, Texas Law Review, 1937 Bar Association Number, p. 99. Against this background, it is rather difficult to believe that when the Legislature finally authorized the Commission to limit production to reasonable market demand, it meant that an even lower figure might be set whenever the Commission concluded that the same would constitute a reasonable reservoir allowable under all the circumstances.

tion for the protection of public and private interests in the prevention of waste and the adjustment of correlative rights, but the Legislature did not stop with this general grant of authority. Section 11 tells us when the powers granted by Section 10 may be exercised. The Commission is instructed there to regulate and prorate production for the protection of correlative rights "when evidence introduced at a hearing to be held as herein provided will support a finding made by the Commission" that potential production is in excess of reasonable market demand. This is a rather clear indication of the legislative intent that the Commission is not to be concerned with correlative rights unless it does make such a finding. It thus appears that the Commission was not intended to have the broad authority and discretion suggested by the provisions of Sections 1 and 22.

The second sentence of Section 12 provides that when the Commission finds that waste exists or is imminent or that the productive capacity of the wells exceeds market demand, it "shall then proceed by proper order to prorate and regulate the gas production from such reservoir on a reasonable basis." If the Legislature had intended for the Commission to fix as the reservoir allowable any amount that might be reasonable under all the circumstances, Section 12 probably would not have gone beyond the first two sentences. See Rudman v. Railroad Commission of Texas, 162 Tex. 579, 349 S.W. 2d 717. Instead of stopping at that point, however, the lawmakers spelled out in some detail how the Commission's duty to regulate gas production is to be performed. It is directed to determine each month: (1) the lawful market demand for gas to be produced from the reservoir during the following month; and (2) the volume of gas that can be produced from the reservoir and from each well therein during such month without waste. The

statute then provides in plain language that the monthly reservoir allowable of gas shall be fixed at the lawful market demand therefor or at the volume that can be produced without waste, whichever is the smaller quantity. In allocating the reservoir allowable among the wells, the Commission is authorized by Section 13 to consider the size of the tracts, the productive capacity of the wells, and "all other factors which are pertinent." It seems rather significant then that the Commission was not given similar authority in fixing the reservoir allowable.

The Legislature undoubtedly contemplated that each well would receive its fair share of the gas produced, but it also specified the means by which that end is to be accomplished. In our opinion the fixing of the reservoir allowable is controlled by the clear and explicit terms of Section 12, and the authority granted to the Commission in that respect is not enlarged by the more general provisions of Sections 1 and 22. "The correction or relaxation of the Section 12 requirements is a legislative matter if the allowables fixed by the Commission pursuant thereto are seriously fallible." Rudman v. Railroad Commission of Texas, supra.

In adopting the order now in question, the Commission has set an arbitrary limit on reasonable market demand for gas from the reservoir and hence upon the reservoir allowable. The limit is based upon factors which have nothing to do with market demand, and we agree with the trial court that the order is beyond the power delegated to the Commission by the Legislature. Appellants point out that Rule 11 will serve to reduce or eliminate any distortion in the reservoir allowables resulting from well bore communication or exorbitant forecasts, but this is purely incidental. The formula prescribed thereby is not related in any way to the quantity of gas passing between the reservoirs or

to the amount by which the forecasts might be regarded as excessive.

We do not mean to suggest that reasonable market demand must always be fixed at the mathematical total of the Producers' Forecasts for the month. Use of these nominations is merely an administrative device, and the Commission may consider and give appropriate weight to all facts that are relevant to a determination of reasonable market demand.

Appellants cite Railroad Commission of Texas v. Rowan Oil Co., 152 Tex. 439, 259 S.W. 2d 173, Corzelius v. Harrell, 143 Tex. 509, 186 S.W. 2d 961, and Brown v. Humble Oil & Refining Co., 126 Tex. 296, 87 S.W. 2d 1069. The opinions in these cases contain general expressions regarding the discretion vested in the Commission and its power to regulate production to protect correlative rights, but none of them throws any light on the question now before us. Appellants also direct our attention to the opinion in *Benz-Stoddard,* where it was said that the validity of Rule 37 and the exception thereto is based upon the principle that the Railroad Commission can so regulate the flow of gas that no unreasonable hardship need result from its application. We adhere to that view, but this Court is not authorized to enlarge the powers granted to the Commission by the Legislature.

It is also argued that the summary judgment was improper because there is no showing that the reservoir allowable determined for any month by use of the procedure provided in Rule 11 was less than the actual reasonable market demand for that month. Appellants cite Railroad Commission of Texas v. Houston Natural Gas Corp., 155 Tex. 502, 289 S.W. 2d 559, as supporting this argument. In that case a rate established by the Commission was attacked

as confiscatory, and we held that the manner in which the Commission arrived at its results was not material if the rate actually yielded a fair return. The decision might be in point if the present suit had been brought for the purpose of questioning the reservoir allowable fixed for a particular month, but here we are concerned with an order which prescribes the use of an illegal method for determining the allowable at all times in the future. The order is subject to attack even though the reservoir allowable calculated in accordance with its provisions for a certain month might not be substantially more or less than the reasonable market demand for gas from the reservoir.

The judgment of the trial court is affirmed.

.....

Ruel C. Walker
Associate Justice

Associate Justices Smith, Norvell and Hamilton dissenting.
Opinion delivered June 22, 1966.

APPENDIX E

IN THE SUPREME COURT OF TEXAS

NO. A-10825

RAILROAD COMMISSION OF TEXAS ET AL., *Appellants* v. WOODS EXPLORATION AND PRODUCING COMPANY, INC., ET AL., *Appellees*	On Direct Appeal from Travis County, Texas

DISSENTING OPINION

I respectfully dissent. By Special Order No. 2-53,009 dated February 1, 1965, the Commission prescribed a formula to be used in determining the maximum reasonable market demand for *five reservoirs* in the Appling Field. Woods Exploration & Producing Co., Inc., et al., instituted this suit against the Commission to test the validity of the order and enjoin its enforcement. Ben Novak and others intervened as plaintiffs. Claire Benz-Stoddard intervened as plaintiff. Aluminum Compay of America, Crown Central Petroleum Corporation and others intervened as defendants and aligned themselves with the Commission in an effort to uphold the order.

Plaintiffs and defendants filed motions for summary judgment. The trial court sustained plaintiffs' motion and entered a judgment that ". . . the ruling of the Railroad Commission on November 4, 1964 and the formal order thereon by the Railroad Commission dated February 1, 1965, being Special Order #2 53,009, effective December 1,

1964, adopting a new procedure for determing the maximum limit on the daily reasonable market demand from the five gas reservoirs, being Appling (Seg. 5) 7500′ field, and the Appling (Seg. 6) 7500′ field, the Appling (Seg. 6) 7600′ field, and the Appling (Seg. 6) 7600′ lower field, and the Appling (Seg. A) Middle Kopnicky Field, situated in Calhoun County, Texas, is not within the statutory authority of the Railroad Commission under Sections 10, 11, and 12, Article 6008, R.C.S. and the undisputed facts and is therefore null and void."

This Court has upheld the trial court judgment. This action of the Court effectively withdraws from the Commission the power granted it by the Legislature to consider correlative rights in establishing a reasonable reservoir allowable. I do not agree with the Court that Article 6008[1] or any section thereof either expressly or by implication withholds from the Commission the power to adjust correlative rights. The history of Article 6008 and other statutes in pari materia does not warrant the drastic holding made herein. I will agree that the Court has narrowed the question, but the result reached is destructive in that it takes from the Commission every semblance of power that this Court has in past decisions recognized that it possessed. The Rudman opinion is the Court's principal authority. That case, as I will later demonstrate, involved no issue concerning the fixing of the field allowable for the field there involved. The plaintiffs cite authorities[2] which have no application here. Those are cases wherein the definition of

[1] All statutes are referred to by the article number under which they appear in Vernon's Annotated Texas Civil Statutes.

[2] Danciger Oil & Refining Co. of Texas v. Railroad Commission of Texas, Tex. Civ. App. 49 S.W. 2d 837 (1932) reversed at 122 Tex. 243, 56 S.W. 2d 1075 (1933); Railroad Commission v. Continental Oil Co., 157 S.W. 2d 695 (Tex. Civ. App. 1941, err. refused, w.o.m.); Colorado Interstate Gas Co. v. The State Corporation Commission of Kansas, 386 P. 2d 266 (1964).

market demand was reached in dealing with statutes relating to market demand for oil. The market demand for oil is usually determined on a *state-wide basis* pursuant to Article 6049(d), Section 6, and Article 6014, rather than on a field-wide or reservoir basis pursuant to Article 6008.[3]

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[3] Art. 6008. "Sec. 1. In recognition of past, present, and imminent evils occurring in the production and use of natural gas, as a result of waste in the production and use thereof in the absence of correlative opportunities of owners of gas in a common reservoir to produce and use the same, this law is enacted for the protection of public and private interests against such evils by prohibiting waste and compelling ratable production.

"* * * *

"Sec. 12. It shall be the duty of the Commission to determine the status of gas production from all reservoirs in this state. If and when the Commission finds that waste exists or is imminent in the production of gas from any reservoir, or that the capacity of the wells to produce gas from any reservoir exceeds the market demand for gas from such reservoir, the Commission shall then proceed by proper order to prorate and regulate the gas production from such reservoir on a reasonable basis. On or before the 20th day of each month, the Commission, after notice and hearing, shall determine (1) the lawful market demand for gas to be produced from each such reservoir during the following month; and (2) the volume of gas that can be produced from such reservoir and each well therein during the following month, without waste. The Commission shall then fix the monthy reservoir allowable of gas to be produced from such reservoir at the lawful market demand therefor or at the volume that can be produced from such reservoir without waste, whichever is the smaller quantity. The monthly reservoir allowable shall be allocated among all wells entitled to produce gas therefrom so as to give each well its fair share of the gas to be produced from the reservoir, provided that each well shall be restricted to the amount of gas that can be produced from it without waste. The volume of gas so allocated to each well shall be regarded as the monthly allowable for such well. The daily market demand for gas, and the daily allowable, shall be determined by dividing the monthly demand and the monthly allowable by the number of days in the month.

"* * * *

"Sec. 22. The Commission shall be vested with a broad discretion in administering this law, and to that end shall be authorized to adopt any and all rules, regulations or orders which it finds are necessary to effectuate the provisions and purposes of said law."

Sections 1 and 22, especially, and even Section 12, do not limit the power of the Commission to enter only such orders as prevent waste. To the contrary the Article specifically directs the Commission to give consideration to protection of correlative rights.

The Commission was confronted with the type of evil mentioned in Section 1 when it adopted the order under consideration. The Commission realized that the undisputed facts warranted action to protect correlative rights and that without the order some of the owners of gas in the reservoirs here involved would not be able to obtain their fair share and would not be able to *produce* and *use* their fair share of the gas in the five reservoirs described in the order. Since the facts are undisputed, I deem it sufficient to state here excerpts from the affidavits of Kenneth B. Ford, affidavits 1 and 2 of Bob R. Harris and the affidavit of James E. Werner, all of which were attached to and in support of Defendants' motion for summary judgment.

Kenneth B. Ford's affidavit dated April 24, 1965, gives the following summation which shows the true picture at the time of entry of the order under attack.

> "13. My study of producer's forecasts, allowables, and production for small tract wells (two acres or less) in these five reservoirs shows that at the present time [April 24, 1965] and for the past several years, these operators of small tract wells, with few exceptions, have been nominating and/or receiving allowable for and/or producing each month more gas than was originally in place under their tracts in these reservoirs.
>
> "14. Based on the facts presented in this Affidavit, it is clear that the special conditions that exist in these five Appling Field Reservoirs do not exist outside the Appling Field in any reservoir in Railroad Commission Districts 2, 3 and 4 and that statewide procedure as outlined in Statewide Rule 31 is not adequate for

these special conditions. For this reason, Special Field Rule 11 written by the Commission is reasonably necessary for effective and fair regulation in these fields."

Ford's affidavit refers to information received from James E. Werner, Senior Geologist, since January, 1956. Werner's affidavit, attached to Railroad Commission's motion for summary judgment, recites that he had made an extensive study of all geological data in the Appling Fields, including induction electric logs on all wells, and micrologs, core analyses, formation test results, sonic logs and formation density logs from all wells where such logs, tests and analyses were obtained.

Affidavit No. 2 by Bob R. Harris, an employee of the Railroad Commission states:

"The Aluminum Company of America application was to amend the Commission's procedure for determining maximum reasonable market demand for *all reservoirs* in the Appling Fields, but the evidence submitted at that time was not sufficient in the opinion of the Commission to justify applying it to all reservoirs. This is the reason the order applied only to the 5 reservoirs covered by the order."

Werner's affidavit states:

"I have prepared structure maps of the productive area of the gas reservoirs referred to below [the five involved] based on this study, and have determined by planimeter the number of productive acres in each reservoir. The results of this are set out below."

Werner's affidavit shows the results of these tests to be as follows:

"APPLING (SEGMENT A,
KOPNICKY, MIDDLE) FIELD

"The Appling (Segment A, Kopnicky, Middle) Field is the deepest reservoir in the Appling Fields, and also

by far the largest. The other productive reservoirs, including those referred to below, lie above the Middle Kopnicky Sand. In my opinion, this reservoir originally contained 4,288 productive surface acres, of which Aluminum Company of America, Crown Central Petroleum Corporation and Pocantico Oil & Gas Corp. (Alcoa et al) have approximately 3,702 acres under lease. I have prepared an isopach map of the original net effective sand which is productive of gas in this reservoir, which was furnished to Mr. Kenneth B. Ford, a petroleum reservoir engineer, to enable him to determine net effective acre feet of productive sand.

"APPLING (SEGMENT 5, 7500') FIELD

"In my opinion, the Appling (Segment 5, 7500') Field is a reservoir originally containing 435 productive surface acres, of which Alcoa et al have under lease approximately 385 acres. I have determined the net productive sand thickness in each of the wells in this reservoir and furnished this information to Mr. Kenneth B. Ford.

"APPLING (SEGMENT 6, 7500') FIELD

"In my opinion, the Appling (Segment 6, 7500') Field is a reservoir originally containing 352 productive surface acres, of which approximately 310 acres are under lease to Alcoa et al. I have determined the net productive sand thickness in each of the wells in this reservoir and furnished this information to Mr. Kenneth B. Ford.

"APPLING (SEGMENT 6, 7600') FIELD

"In my opinion, the Appling (Segment 6, 7600') Field is a reservoir originally containing 485 productive surface acres, of which 443 acres are under lease to Alcoa et al. I have determined the net productive sand thickness in each of the wells in this reservoir and furnished this information to Mr. Kenneth B. Ford.

"APPLING (SEGMENT 6, 7600', LOWER) FIELD

"In my opinion the Appling (Segment 6, 7600', Lower) Field is a reservoir originally containing 525 productive surface acres, of which 481 are under lease to Alcoa et al. I have determined the net produtive sand thickness in each of the wells in this reservoir and furnished this information to Mr. Kenneth B. Ford."

The Harris affidavit no. 1 as well as the affidavits heretofore discussed, vividly portray the probable imminent evils contemplated in Section 1, Article 6008, supra, which would have resulted had the Commission elected to continue the normal procedure of determining the monthly allowable for each prorated gas reservoir in the Appling Fields area. The Commission was confronted with the necessity of determining whether to continue utilization of the procedures set out in State-wide Rule 31 (c) and (e) or whether to discard the normal procedure and adopt in its place a method which under the undisputed evidence would adequately protect correlative rights and a method "deemed necessary to restrict the production of gas to an amount equal to market demand as is required of the Commission by the statutes." See the Exception in Rule 31. This was a special condition and the market demand order relates solely to the five Appling Field reservoirs. The Railroad Commission expressly found and recited in the order under attack that:

"From evidence adduced at said hearing, it was apparent to the Commission that procedure in use for determining the market demand for gas from the mentioned fields provided a means by which an operator could distort the market demand determination to such an extent that Commission proration and ratable take orders were rendered completely ineffective; that the resulting injury to correlative rights could be adjusted by modifying the market demand procedure; that the suggested alteration in the procedure for determination

of reasonable market demand as modified by the Commission would reduce the ability to manipulate and distort the reasonable market demand determination for the fields."

This Court should bear in mind that the order under attack was not entered as the result of our holding in the case of Railroad Commission of Texas v. Aluminum Company of America, supra. The market demand order is in no sense an attempt to circumvent our decision. The plaintiffs' claim that such is the purpose of the order is wholly unfounded. The Railroad Commission order in the Aluminum Company case was effective January 30, 1961, whereas the Railroad Commission order in the present case was issued effective December 1, 1964. The order under attack is based on occurrences after January 30, 1961. The Railroad Commission order in Aluminum was entered on the basis of facts and conditions which existed on January 30, 1961, when the order became effective. When the order under attack was entered many material changes had occurred between January 30, 1961, and May, 1964. The prior order did not and could not adjudicate conditions existing on December 1, 1964, or the validity of an order effective on that date.

The hearing which preceded the adoption of the order under attack was held on December 5 and 6, 1963. On November 4, 1964, the Commission ordered its adoption, effective December 1, 1964. The Examiner, who conducted the hearing for the Railroad Commission, determined from an examination of the producers forecasts allowable schedules, production reports and well test reports filed with the Commission by operators of many wells on small tracts, that they were following the practice of filing producers forecasts, combined with the forecasts of the other operators, causing the customary (Rule 31) Commission pro-

cedure for determining allowables to result in classification of wells located on larger tracts as limited capacity wells (wells unable to produce the allowable which would normally be assigned thereon), and the small tract wells received allowables for greater than the *share of reservoir allowable* they would have received pursuant to the ⅓ per well — ⅔ acreage allocation formula in effect in the field.

The undisputed evidence conclusively establishes that in order to protect correlative rights, the Commission not only had the power under authority of the Legislature to adopt the order, but it would have been derelict in its duty if it had failed to so act. I think this case presents a state of facts which the Legislature intended for the Commission to adjust so as to ultimately give to each operator, small or large, his fair share of the gas in the reservoir. The condition here, so far as correlative rights are concerned, are analogous to the conditions described in the cases of Brown v. Humble Oil & Refining Company, 126 Tex. 296, 87 S.W. 2d 1069, 1070 (1935); Corzelius v. Harrell, 143 Tex. 509, 186 S.W. 2d 961 (1945); Gulf Land Co. v. Atlantic Refining Co., 134 Tex. 59, 131 S.W. 2d 73 (1939); Magnolia Petroleum Co. v. Railroad Commission, 128 Tex. 189, 96 S.W. 2d 273 (1936); Railroad Commission v. Manziel, 361 S.W. 2d 560 (Tex. 1962).

In these cases, the Court was concerned with the question of the extent the Legislature had clothed the Commission with the power to regulate oil and gas production under the Texas Conservation Statutes. In Corzelius v. Harrell, supra, this Court said:

> "The law under consideration states in detail the manner and method the Commission may follow in prorating and regulating the daily gas well production from each common reservoir. The Legislature recognized the difficulty of prorating and regulating the pro-

> duction of gas from a common reservoir. *To make sure that the Commission was not to be bound by any narrow, technical rules in carrying out the objects of this law, the Legislature was particular to give the Commission broad discretion in the exercise of its power under the provisions of this law.*" [Emphasis added.]

In Brown v. Humble, *supra*, on motion for rehearing, this Court emphasized the broad and liberal standards to be applied to the conservation orders of the Railroad Commission and stated that the duty is lodged with the Commission to make rules to carry out the mandates of the Legislature and to impartially enforce them. We further said that all rules and rulings of the Railroad Commission are presumed to be valid unless the contrary is made to appear.

These cases announce principles in keeping with repeated statutory declarations of the broad discretion vested in the Commission. See Section 22, Article 6008, *supra*. Another such statutory declaration is to be found in Article 6042, wherein it is provided:

> "Particular powers herein granted to the Commission shall not be construed to limit the general powers conferred by law, and until set aside or vacated by some order or decree of a court of competent jurisdiction, all orders of the Commission as to any matter within its jurisdiction shall be accepted as prima facie evidence of their validity."

In the case of Railroad Commission v. Rowan Oil Co., 152 Tex. 439, 259 S.W. 2d 173, 176 (1953), we said that:

> "All property is held subject to a valid exercise of the police power. That some operators will have a less profitable operation, be delayed in recovering their gas, or be in trouble with their creditors does not affect the

> Commission's duty to enforce conservation by preventing waste. Neither does it make the Commission's action arbitrary or confiscatory if correlative rights are protected."

As heretofore pointed out, Rule 31 itself expressly reserves the power of the Commission to make any modifications or adjustments that the Commission, in its discretion deems necessary to prevent waste *or to protect correlative rights.*

The Manziel case, *supra,* was one brought by the Manziels attacking a Railroad Commission order on the grounds that it would cause waste, that it would result in the confiscation of the Manziels' property, that the permit was not necessary to protect the correlative rights of the Whelans and that the order was in violation of the Commission's own rules. The Manziels contended that the Railroad Commission's order authorizing the Whelans to drill a well at an irregular location was violative of Article 6029(4). The Commission took the position that it must have the authority to grant the location of water injection wells to prevent drainage and to protect correlative rights. Here the Commission was confronted with a situation where it had adopted no field-wide spacing rule for water injection wells, but had made special orders as to each operator desiring to flood. In Manziel, we upheld the order of the Commission, saying:

> "The Commission has two primary duties in the administration and control of our oil and gas industry. It must look to each field as a whole to determine what is necessary to prevent waste while at the same time countering this consideration with a view toward allowing each operator to recover his fair share of the oil in place beneath his land. In carrying out these duties, there has devolved upon the Commission the power to

promulgate rules, orders and regulations that control the industry, and such are issued pursuant to the police power of the state, and that power may invade the right of the owner of the land to the oil in place under his land as long as it is based on some justifying occasion, and is not exercised in an unreasonable or arbitrary manner. See Brown v. Humble Oil and Refining Co., 126 Tex. 269, 83 S.W. 2d 935 (1935)."

In view of these repeated judicial and statutory declarations of the broad powers and discretions vested in the Railroad Commission by the Legislature, it is inconceivable that this Court at this late date would hold that the Commission has *no power* to fix the Appling Field allowable in a manner that will result in reasonable individual well allocations and some degree of increased protection for the correlative rights of the Intervenor-Defendants.

I find no case which sustains the plaintiffs in their contention that the Railroad Commission has *no power* to consider the protection of correlative rights or to employ methods designed to see that each individual well gets its *fair share* of the total production from the common gas reservoir in fixing allowables. The Commission is not strictly limited to the clerical function of running up the mathematical total of the producers' forecasts in determining the field allowable. The Court seems to indicate that the Rudman case, *supra,* so holds. I have hurriedly examined the Rudman record and feel safe in saying that it does not. That case merely holds that the field allowable must be determined in advance of the month to which it is applicable and that it cannot be determined retroactively after the month has expired.

At this time I forego writing upon the question of whether or not the Commission's and the other defendants' motions

for summary judgment should have been granted. I would, however, reverse the judgment of the trial court.

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Clyde E. Smith
Associate Justice

Associate Justices Norvell and Hamilton join in this dissent.
Opinion delivered: June 22, 1966.

APPENDIX F

IN THE SUPREME COURT OF TEXAS

No. A-10,825

RAILROAD COMMISSION OF TEXAS ET AL. *Appellants* v. WOODS EXPLORATION AND PRODUCING COMPANY, INC. ET AL. *Appellees*	On Direct Appeal from Travis County, Texas

DISSENTING OPINION

I respectively dissent. The Court's opinion graphically sets out the mass confiscation of property and the gross injustice that results from an enforcement of Rule 31 prior to the amendment that is under attack here. According to Rule 31 before amendment the principal factor to be considered in determining reservoir market demand is the sum total of all gas which producers say they expect to produce the following month and submit on Producers' Forecasts.

What caused the rule to break down, resulting in the chaos described in the Court's opinion, was that producers of gas from small tracts (in most cases 1/10 of an acre) did not confine their forecasts to the volume of their own gas which they expected to produce the following month. In most of such cases a producer would say in effect that he had a sale for all the gas he could produce under the field proration formula, but in addition he could produce and sell more than ten times that much more gas belonging

to his neighbors. By taking the sum total of such Producers' Forecasts the Commission was not considering the market demand for gas which the producers had available for sale under the field proration formula as established by Rule 5, but was taking into consideration the gas of other owners, which the producers had no right to offer for sale or to produce. It is evident that consideration of this factor could not furnish any reasonable basis upon which the Commission could determine the true lawful market demand for gas to be produced from the reservoir under the existing regulations.

The Commission came to the conclusion that in considering and determining the market demand for gas to be produced from each reservoir that it should consider only so much of the Producers' Forecasts as would not exceed the amount of gas which producers could lawfully produce from the reservoir under the allocation formula set out in Rule 5. This is all that Rule 11, the amendment under attack here, seeks to accomplish. It adds another factor to be considered by the Commission in arriving at the lawful demand. It allows the Commission to determine market demand for the gas to be produced from the reservoir under regulation rather than for gas produced at full capacity of the wells.

The real question, then, before the Court is what gas does the Commission take into consideration in determining lawful market demand at its monthly hearings. Does it take into consideration gas to be produced at full capacity of the wells in each reservoir or gas to be produced from each reservoir under the field regulations then in existence? If we determine that the Commission is correct in considering only the gas that can be lawfully produced under the regulations already in existence at the time of its hearing,

then the problem with which the Court struggles in its opinion never does arise.

In determining whether the Commission is correct in its approach to this problem we must bear in mind that before the Commission ever had any right to exercise the broad powers the Legislature granted it to prorate and regulate the production of gas it first had to be determined that the capacity of the wells to produce gas from the reservoir in question exceeded the market demand for gas from such reservoir. This finding was made some years ago and the Commission proceeded as the statute directs by orders to promulgate rules and regulations governing the production of gas from each reservoir. These regulations established spacing rules and, for the reservoir in question, it established a 320-acre spacing unit rule with a proviso for exceptions to Rule 37, under which the Commission has granted 17 exceptions in order to prevent confiscation of gas. Then in order to prevent excess drainage from regular size units by these small units the Commission adopted Rule 5, which is the ⅓-⅔ proration formula, ⅔ of production based on acreage, and ⅓ on per well factor. It is this rule that automatically puts a limit on the maximum amount of gas which can be produced from each welll, and consequently a limit on the maximum of production of gas from each reservoir.

It is only after all these things have been done by the Commission that it then at the direction of the Legislature has a hearing on or before the 20th of each month to determine the lawful market demand for gas to be produced from each reservoir for the following month. The lawful producing capacity of each reservoir has already been determined. The Legislature necessarily had in mind that this would have been done before the Commission was called upon to determine the lawful market demand. It neces-

sarily follows that the Legislature, when it said "to determine the lawful market demand for gas to be produced", had in mind the gas to be produced under the regulations then in force.

All that Rule 11, the amendment under attack, does is to say that as to the Producers' Forecasts it will consider so much of the forecasts as does not exceed the amount which the producer can lawfully produce under the regulations in force. If they do not exceed such amount, then the Commission will fix the market demand at the sum total of the Producers' Forecasts. If they do exceed such amount, then the Commission will fix the lawful market demand at the maximum which the producers could produce under the regulations.

It can be seen that the Commission is not arbitrarily fixing the market demand, but is fixing it in the light of all the facts and circumstances before it at the time it is called upon to make the determination. The Commission considers not only the nominations of purchasers and Producers' Forecasts, but also the supply of gas that may be lawfully produced from the reservoir. All these factors bear on the lawful or reasonable market demand the Legislature had in mind when it directed the Commission to determine the lawful market demand for gas to be produced from the reservoir.

This Court, in making its holding, says:

> "In adopting the order now in question, the Commission has set an arbitrary limit on reasonable market demand for gas *from the reservoir* and hence upon the reservoir allowable. The limit is based upon factors which have nothing to do with market demand * * *." (Emphasis mine.)

In the first place, the statute does not direct the Commission to determine the reasonable market demand for gas

from the reservoir, but it is for the gas *to be produced* from the reservoir. This means a reservoir which is necessarily already under proration, or else the Commission would not be called upon by such statute to determine any market demand. Consequently, the market demand, with which we are concerned here, is for gas to be produced from the reservoir under proration. The Court is holding as a matter of law that the Commission cannot consider the supply of gas as is limited by proration in determining market demand, and has stricken the order of the Commission, which in effect says that the Commission will consider nominations and Producers Forecasts, but only to the extent that they do not exceed the maximum amount that can be produced under proration, as fixed by the Commission. This is a strange holding, in view of the fact that the Commission would have no power or authority whatever, in a case where waste is not involved, to determine market demand, unless it did relate to correlative rights. Any such order of the Commission establishing the factors to be considered in determining lawful market demand would be without authority if it did not concern correlative rights. Section 1, Article 6008, is as follows:

> "Sec. 1. In recognition of past, present, and imminent evils occurring in the production and use of natural gas, as a result of waste in the production and use thereof in the absence of correlative opportunities of owners of gas in a common reservoir to produce and use the same, this law is enacted for the protection of public and private interests against such evils *by prohibiting waste and compelling ratable production.*" (Emphasis mine.)

By this provision and others the Legislature has said in no uncertain terms that the Commission may promulgate orders and rules only when they have some reasonable relation to the prohibition of waste or the compelling of

ratable production among the owners of gas in a common reservoir. The Supreme Court of the United States, in Thompson v. Consolidated Gas Utilities Co., 300 U.S. 55, 57 S. Ct. 364, 371, 81 L. Ed. 510, in affirming the lower courts which had held invalid an order of the Texas Railroad Commission ostensibly issued under the authority of Article 6008, R. C. S., said this:

> "'Proration orders would not be valid if shown to bear no reasonable relation either to the prevention of waste or the protection of correlative rights, or if shown to be otherwise arbitrary."

The whole opinion of this Court shows that it misses the entire purpose and reason for the existence of Article 6008. The very basis of any power given the Railroad Commission is to prevent waste or to protect correlative rights. Consequently, in analyzing Section 12 of Article 6008, after the Commission has determined that facts exist which give it authority to proceed to prorate and regulate oil and gas production, then everything the Commission does thereafter under Section 12 has to be either related to correlative rights or waste. The Commission is given no authority to establish any rule or order which does not have some reasonable relation to one or the other. Consequently, when this Court says that Rule 11 which is under attack here is invalid because it has the effect of protecting correlative rights it is doing so in the face of the plain purposes and provisions of the statute.

The Court, in arriving at its holding, not only ignores the above-quoted Section 1 of Article 6008, but also ignores Section 22 of said article, which reads as follows:

> "Sec. 22. The Commission shall be vested with a broad discretion in administering this law, and to that end shall be authorized to adopt any and all rules,

regulations or orders which it finds are necessary to effectuate the provisions and purposes of said law."

It is interesting to note how the opinion treats the provisions of Sections 1 and 22 as mere suggestions and comes to the conclusion that the Legislature had no intention of giving the Commission the broad authority and discretion contained in the provisions of said sections. The Court reaches its conclusion through an analysis of Sections 10 and 11 of Article 6008, which read as follows:

"Sec. 10. It shall be the duty of the Commission to prorate and regulate the daily gas well production from each common reservoir in the manner and method herein set forth. The Commission shall prorate and regulate such production for the protection of public and private interest:

"(a) In the prevention of waste as 'waste' is defined herein;

"(b) In the adjustment of correlative rights and opportunities of each owner of gas in a common reservoir to produce and use or sell such gas as permitted in this Article.

"Sec. 11. The Commission shall exercise the authority to accomplish the purpose designated under item (a) of Section 10 when the presence or imminence of waste is supported by a finding based upon the evidence introduced at a hearing to be held as herein provided.

"The Commission shall exercise the authority to accomplish the purpose designated under item (b) of Section 10 when evidence introduced at a hearing to be held as herein provided will support a finding made by the Commission that the aggregate lawful volume of the open flow or daily potential capacity to produce of all gas wells located in a common reservoir, is in excess of the daily reasonable market demand for gas from

gas wells that may be produced from such common reservoir, to be utilized as permitted in this Article."

The Court, after noting the powers granted the Commission in Section 10 to regulate and prorate production for the protection of correlative rights "when evidence introduced at a hearing to be held as herein provided will support a finding made by the Commission", that potential production is in excess of reasonable market demand, it then makes this statement:

> "This is a rather clear indication of the legislative intent that the Commission is not to be concerned with correlative rights unless it does make such a finding."

That statement is just as true as it can be, but what the opinion fails to say is that the Commission did make that finding; it did become concerned with correlative rights; it did promulgate a proration order covering the reservoirs here involved, which is Rule 5, to protect correlative rights. Once the Commission made the finding that potential production is in excess of reasonable market demand all the broad powers and discretion conferred upon the Commission to prorate and regulate production of oil and gas came into effect. Yet the Court's opinion says that, because the Commission first had to make that finding, "It thus appears that the Commission was not intended to have the broad authority and discretion suggested by the provisions of Sections 1 and 22." It is difficult to see how the Court can conclude, from the reasons it gave, that the Legislature did not mean what it said.

I disagree with the Court's definition of "lawful market demand" as used in that part of the sentence in Section 12 as follows: "* * * shall determine (1) the lawful market demand for gas to be produced from each reservoir during the following month; * * *." The Court defines it as "reason-

able market demand for lawful uses." It does mean that, but it means more in the context in which it is used. I would add to the Court's definition "and lawfully produced." As stated above, there was in effect at the time the Commission promulgated the amendment now under attack a valid and subsisting proration order covering the reservoirs in question. This order is not under attack here and is still in force. Until set aside it has the effect of law. Section 16 of Article 6008 says: "It shall be unlawful for any person to produce gas from a gas well in violation of the valid orders of the Railroad Commission of Texas."

While the Court says that it does not mean to suggest that reasonable market demand must always be fixed at the mathematical total of the Producers' Forecasts for the month and that the Commission may consider and give appropriate weight to all factors that are relevant to the determination of reasonable market demand, they are rather empty words. The Court holds that the Commission may not consider correlative rights as a factor in the determination of market demand. In view of this holding of the Court there is no way in which the Commission can protect correlative rights. If Woods Exploration Company and a small pipe line can destroy correlative rights in the reservoirs in question it is unthinkable what larger pipe lines can do to gas fields all over this state wherever there are small tract owners located.

The Court says in effect that the Legislature gave broad powers to protect correlative rights to the Commission throughout the statutes on oil and gas but took it away with one stroke of the pen when it wrote this one phrase "shall determine (1) the lawful market demand for gas to be produced from each such reservoir during the following month; * * *." This in spite of the fact that the Legislature nowhere told the Commission what it must or must not

consider in determining lawful market demand. The effect of this holding is to destroy, in so far as gas fields in which there are small tract owners are concerned, the power of the Commission to protect correlative rights. This Court has said numerous times contrary to the present ruling that the Commission has broad powers in so prorating and regulating oil and gas production as to protect correlative rights. Railroad Commission v. Shell Oil Company, 380 S.W. 2d 556, at 559; Marrs v. Railroad Commission, 142 Tex. 293, 177 S.W. 2d 941; Gulf Land Co. v. Atlantic Refining Co., 134 Tex. 59, 131 S.W. 2d 73; Atlantic Refining Co. v. Railroad Commission, 162 Tex. 274, 346 S.W. 2d 801; Halbouty v. Railroad Commission, Tex., 357 S.W. 2d 364.

I would reverse the judgment of the trial court.

.....

Robert W. Hamilton
Associate Justice

RWH/p

Associate Justices Smith and Norvell join in this dissent.

Opinion delivered:

June 22, 1966

APPENDIX G

SUPREME COURT OF TEXAS

* * * * *

August 10, 1966.

No. A-10,825.

RAILROAD COMMISSION OF TEXAS ET AL. v. WOODS EXPLORATION AND PRODUCING COMPANY, INC. ET AL.	Direct Appeal From Travis County.

Appellants' motion to stay enforcement of mandate filed herein on August 8, 1966, having been duly considered by the Court, it is ordered that said motion be, and hereby is, granted.

It is ordered that the Clerk of the District Court of Travis County, Texas, return said mandate to the Clerk of the Supreme Court.

It is further ordered that the Clerk of this Court withhold issuance of mandate in this case for a period of ninety (90) days from July 27, 1966, and that execution and enforcement of the judgment entered herein on June 22, 1966, be stayed for such period, but not thereafter unless further delay of issuance of mandate and execution and enforcement of the judgment of this Court is ordered by the Supreme Court of the United States on petition made in that Court.

APPENDIX H

EXHIBIT 3
AFFIDAVIT OF BOB R. HARRIS
(Harris Affidavit No. 1)

THE STATE OF TEXAS }
COUNTY OF TRAVIS }

BEFORE ME, the undersigned authority, a Notary Public in and for said County and State, personally appeared BOB R. HARRIS, well known to me, and having been first duly sworn by me, upon his oath did depose and say:

1. I am Bob R. Harris. I am over 21 years of age and competent to testify to the facts herein set forth, and make these statements of my own knowledge.

2. I am a professional petroleum engineer and am a Registered Professional Engineer in Texas. I am employed by the Railroad Commission of Texas, and have been so employed for the past nine years. From March, 1960, to September, 1963, I was in charge of the Gas Proration Department of the Commission. I am now Director of Research and Inspection and still advise and direct certain phases of gas proration. I am familiar with the manner in which the Commission arrives at the monthly gas allowables to be assigned individual gas fields in Texas, and particularly the Appling (Segment 5, 7600′) Field, the Appling (Segment 6, 7500′) Field, the Appling (Segment 6, 7600′) Field, the Appling (Segment 6, 7600′, Lower) Field, and the Appling (Segment A, Middle Kopnicky) Field, all situated in Calhoun County, Texas. I am further generally familiar with producers nominations, volumes of gas produced and reported to the Commission, allowables

assigned, and the comparative size of these items in relation to the same items in other gas fields.

3. Normally the monthly gas allowable for each prorated gas reservoir in the Appling Fields area is determined pursuant to Commission Statewide Rules 31(c) and (e); a copy of which (Attachment "A") is attached to and made a part of this affidavit. However, in some cases the Commission has determined that the utilization of the procedures set out in Rule 31 does not result in a correct determination of market demand in accordance with Art. 6008, V.A.C.S. Pursuant to the exception in Rule 31 reading:

> "Nothing herein shall be interpreted, however, as binding on the Commission to the extent that any adjustment of nominations cannot be made which is deemed necessary to restrict the production of gas to an amount equal to market demand as is required of the Commission by the Statutes."

the Commission has in such cases discarded the procedure set out in Rule 31 and utilized in its place other methods, such as averaging of twelve previous months' production from the particular reservoir as was done in the Appling (Segment 2, 7500') Field, or acceptance and use of the nominations for gas purchases filed by purchasers of gas (as in the West Panhandle Field). In October, 1963, Aluminum Company of America, an operator of a number of Appling Fields wells, complained to the Commission that allowables assigned to certain reservoirs in the Appling Fields area, including the five referred to above, did not represent the reasonable market demand, as required by the applicable statutes. A hearing was held on this matter on December 5 and 6, 1963, at which I presided as Examiner. On November 4, 1964, the Commission ordered the adoption,

effective December 1, 1964, of a new procedure for determining a maximum limit on the allowable from the five gas reservoirs referred to above, as set out in its letter dated November 5, 1964, a copy of which (Attachment "B") is attached to and made a part of this affidavit. A copy of the description of the procedure involved which was referred to in such letter (Attachment "C") is also attached to and made a part of this affidavit. This order was supplemented by a formal Commission order, a copy of which (Attachment "D") is attached to and made a part of this affidavit, adopting this procedure as a new field rule with respect to the five reservoirs referred to above. Prior to this order, I reviewed the evidence submitted at the hearing and made an independent investigation on behalf of the Commission to verify the true condition in these five reservoirs. I determined from an examination of the producers forecasts, allowable schedules, production reports and well test reports filed with the Commission by operators of wells completed in these five reservoirs that operators of many wells on small tracts were following the practice of filing producers forecasts at or near the full delivery capacity of their wells, and that these forecasts, combined with the forecasts of the other operators, caused the customary Commission procedure for determining allowables to result in assignment of huge reservoir allowables, in turn this resulted in classification of wells located on larger tracts as limited capacity wells (wells unable to produce the allowable which would normally be assigned thereon), and the smaller tract wells received allowables far greater than the share of reservoir allowable they would have received pursuant to the ⅓ per well — ⅔ acreage allocation formula in effect in the field.

4. This situation has continued in these five reservoirs for many months. July, 1964, was a fairly typical month. My analysis (Attachment "E") of the allowables assigned in July, 1964, to the Appling (Segment 5, 7500') Field is attached to and made a part of this affidavit. The Crown Central State Tract No. 256 Well No. 2-UT was situated on the largest proration unit in this reservoir. This unit contained 328 acres, and only 335.132 acres were assigned to the 18 wells eligible to receive an allowable in that month, including the Crown Central Well. The 17 small tract wells developed a tremendous aggregate delivery capacity compared to the size tracts on which they were located. This delivery capacity enabled operators of these wells likewise to make nominations for gas production (Producers' Forecasts) which were tremendous when compared to the size tracts in which they were located. As a result of the aggregate Producers' Forecasts for July, 1964, the Crown Central well would have required a delivery capacity of approximately 591,000 MCF per month in order to produce its correct share of the reservoir allowable under the ⅓ well — ⅔ acreage allocation formula then in effect for this reservoir. No gas well in this field has demonstrated a capability of this magnitude. Hence the Crown Central well's excess allowable of more than 550,000 MCF of gas during July, 1964, was distributed to town lot wells, by application of the Commission's customary procedure for determining reservoir allowables. In each of the other four reservoirs, the well on the largest proration unit likewise suffered redistribution of allowable to smaller tract wells, as shown on the Commission's July, 1964, gas allowable schedule, copy of which (Attachment "F") is attached to and made a part of this affidavit. In all five reservoirs, the wells located on the largest proration units were receiving

less than the allowable which would be assigned under the 1/3 well — 2/3 acreage allocation formula. The 1/3 well — 2/3 acreage allocation formula itself establishes a drainage advantage in the town lot wells as compared to the large tract wells in these reservoirs. The Commission procedure for determining reservoir allowables virtually nullified the allocation formula, and increased the drainage advantage in the town lot wells.

5. The Commission's new procedure insures that a well on the largest proration unit in a reservoir, provided it has as great a delivery capacity as any other well in the reservoir, will not be penalized and classed as a "limited capacity" well because of gas nominations (Producers' Forecasts) made by operators of small tract wells completed in the reservoir. The maximum which is considered to be the reasonable market demand is that quantity of monthly reservoir gas production which would permit the well on the largest proration unit, provided its delivery capacity is equal to the largest delivery capacity of any well in the reservoir, to receive an allowable which it would be capable of producing. Attachment "E" demonstrates what allowables would have been assigned in July, 1964, had the new procedure been in effect for that month. While the Crown Central well did not have the maximum delivery capacity of any well in the field, had it had that capacity it would have received an allowable of 87,414 MCF for that month. Since its capacity was only 34,410 MCF per month, it would receive that allowable. This well's limited capacity, however, was not a limiting factor on the reservoir allowable. In fact, the top producing capacity well was the Novak-Bacon Town-Well No. 1-C, a small tract well. Under the operation of the Commission's amended procedure, any operator is free to retest at any time the delivery capacity

of his well; if he can retest such well at a higher rate than any other well in the field, then under this procedure, for the next succeeding month and thereafter until such time as some different maximum delivery capacity is established, that delivery capacity becomes the criterion for determining the maximum reasonable market demand. If, however, the total nominations are less than the maximum reasonable market demand, then such lesser amount is assigned as the reservoir's allowable. The Commission's new procedure does not prescribe the reasonable market demand for a gas reservoir, but simply places a top limit on it, beyond which point it is considered not to be the reasonable market demand.

Further Affiant sayeth not.

/s/ Bob R. Harris

SWORN TO AND SUBSCRIBED before me this 31st day of March, 1965.

(Seal)

/s/ E. A. Cox
Notary Public in and for
Midland County, Texas.

ATTACHMENT D
(to Harris Affidavit No. 1)

RAILROAD COMMISSION OF TEXAS
OIL AND GAS DIVISION

OIL AND GAS DOCKET
NO. 2-53,009

IN RE: CONSERVATION AND PREVENTION OF WASTE OF CRUDE PETROLEUM AND NATURAL GAS IN THE APPLING FIELDS, JACKSON AND CALHOUN COUNTIES, TEXAS

Austin, Texas

February 1, 1965

SPECIAL ORDER

AMENDING SPECIAL ORDER NO. 2-45,587 ISSUED EFFECTIVE JANUARY 30, 1961, AS AMENDED, BY THE ADOPTION OF AN ADDITIONAL RULE PERTAINING TO THE PROCEDURE FOR DETERMINING REASONABLE MARKET DEMAND FOR CERTAIN APPLING FIELDS, JACKSON AND CALHOUN COUNTIES, TEXAS

WHEREAS, After due notice the Railroad Commission of Texas held a hearing on December 5, 1963 concerning the application of Aluminum Company of America for an alteration in procedure for determining reasonable market demand for the Appling, Segment 5, 7500'; the Appling, Segment 6, 7500'; the Appling, Segment 6, 7600'; the Appling, Segment 6, 7600' Lower; and the Appling, Segment "A" Kopnicky, Middle Fields, Jackson and Calhoun Counties, Texas; and

WHEREAS, From evidence adduced at said hearing it was apparent to the Commission that procedure in use for determining the market demand for gas from the mentioned fields provided a means by which an operator could distort the market demand determination to such an extent that Commission proration and ratable take orders were rendered completely ineffective; that the resulting injury to correlative rights could be adjusted by modifying the market demand procedure; that the suggested alteration in the procedure for determination of reasonable market demand as modified by the Commission would reduce the ability to manipulate and distort the reasonable market demand determination for the fields; and

WHEREAS, From evidence adduced at said hearing and from a study made of the effect that the suggested alteration in procedure would have on the proration and ratable take orders the Commission is of the opinion and finds that the adoption of such a rule is reasonably necessary to effective fair regulation in such fields.

NOW, THEREFORE, IT IS ORDERED By the Railroad Commission of Texas that effective December 1, 1964, Special Order No. 2-45,587 issued effective January 30, 1961, as amended, be and it is amended by the adoption of an additional rule pertaining to the procedure for determining reasonable market demand for certain Appling Fields, Jackson and Calhoun Counties, Texas such additional rule to read and provide as follows:

RULE 11: a. The reasonable market demand for the Appling, Segment 5, 7500'; the Appling, Segment 6, 7500'; the Appling, Segment 6, 7600'; the Appling, Segment 6, 7600', Lower; and the Appling, Segment "A" Kopnicky,

Middle Fields, Jackson and Calhoun Counties, Texas shall be allocated to each well in each field in accordance with the allocation formula for such field.

b. The daily reasonable market demand for gas for each of the mentioned fields shall be the lesser gas volume figure as determined *either* by summation of nominated volumes taken from producers' forecasts, *or* by dividing the reported productive capability as shown on the GWT-2 test of the well exhibiting the greatest ability to deliver gas to normal gathering facilities by the participation factor of the largest proration unit.

c. The monthly reasonable market demand for gas shall be determined by multiplying the daily reasonable market demand by the number of days in the month.

IT IS FURTHER ORDERED That the remaining rules as stated in Special Order No. 2-45,587 are in no way altered nor amended by the provisions of this order.

It is expressly stated by the Commission that the issuance of this order shall not be considered to alter action taken by the Commission in another matter concerning the same fields at the same time, such action being temporarily suspended pending further investigation.

IT IS FURTHER ORDERED That this cause be held open on the docket for such other and further orders as may be necessary.

RAILROAD COMMISSION OF TEXAS

/s/ BEN RAMSEY
Chairman

/s/ JIM C. LANGDON
Commissioner

.....
Commissioner

ATTEST:

/s/ FRED OSBORNE
Secretary

[SEAL]

AFFIDAVIT OF BOB R. HARRIS
(Harris Affidavit No. 2)

THE STATE OF TEXAS }
COUNTY OF TRAVIS }

BEFORE ME, the undersigned authority, a Notary Public in and for said County and State, personally appeared BOB R. HARRIS, well known to me, and having been first duly sworn by me, upon his oath did depose and say:

1. I am Bob R. Harris. I am over 21 years of age and competent to testify to the facts herein set forth, and make these statements of my own knowledge.

2. I am a professional petroleum engineer and am a Registered Professional Engineer in Texas. I am employed by the Railroad Commission of Texas, and have been so employed for the past nine years. From March, 1960, to September, 1963, I was in charge of the Gas Proration Department of the Commission. I am now Director of Research and Inspection and still advise and direct certain phases of gas proration. Commencing in 1961, the Commission ordered a series of tests of all multiply completed wells in the Appling Fields in order to determine whether there was wellbore communication in any of these wells which would permit gas from one reservoir to be transferred through the wellbore in any such well to some other reservoir in which the well was completed and/or would permit gas from one reservoir to transfer through the well bore in any such well to the completion in another reservoir and be produced ostensibly as gas from such other reservoir; these tests are generally called packer leakage tests, although in fact, they are wellbore communication tests not limited to leaking packers. I have been in charge generally

of these tests for the Commission reviewing the results of the packer leakage tests run and reported to the Commission.

Attachment 1 to this Affidavit is a tabulation of the wells in which wellbore communication has been shown to exist by the reports of packer leakage tests submitted to the Railroad Commission, the date of such tests when wellbore communication was found to exist and the reservoirs in which the wells were completed.

There have been at least 43 instances in which wellbore communication was found to exist in multiply completed wells having at least one completion in one of the reservoirs covered by the Commission's Appling Fields Order amending procedures for determining reasonable market demand (the "Market Demand Order"). Wellbore communication has been exhibited in a total of at least 31 wells for at least one completion in a reservoir covered by this order, and at least 19 of these wells were completed both in the Middle Kopnicky reservoir and in some upper zone reservoir to which this order applies.

Wellbore communication between reservoirs has been a continuing problem in the Appling Fields, and particularly in the reservoirs covered by the Market Demand Order. For example, in the regular Commission-ordered tests in 1964, 15 wells were shown to have wellbore communication involving at least one reservoir covered by this order and 8 of these wells were completed both in the Middle Kopnicky reservoir and one of the upper zone reservoirs covered by such order. Only a few months later, when Commission personnel themselves ran packer leakage tests on all wells, wellbore communication was found in 18 wells having at least one completion in a reservoir covered by the Market

Demand Order, and of these, 9 wells were completed both in the Middle Kopnicky reservoir and some upper zone reservoir covered by this order.

This wellbore communication has a distorting effect upon gas allowables in the 4 upper zone reservoirs covered by the Market Demand Order. Since the Middle Kopnicky reservoir is a much larger reservoir and generally has higher pressures than the upper zone reservoirs, wellbore communication in a multiply completed well tends to cause an apparent increase in the producing capability of the upper zone completion in that well, and permits Producers' Forecasts to be filed by the operator of such a well far in excess of the true delivery capacity the well completion would have if no communication existed; this communication will allow gas to be produced through and credited to an upper zone reservoir well completion when in fact it had its source in the Middle Kopnicky reservoir or some other higher deliverability reservoir. In addition, the transfer through wellbore communication from one reservoir to another may cause all wells in the transferee reservoir to evidence producing capacities in excess of what they should be. The Market Demand Order tends to minimize the effect of this wellbore communication.

3. The Communication in certain Appling Field reservoirs has from time to time discarded Producers' Forecasts as not reflecting market demand; for several years, and until about August, 1963, Producers' Forecasts were not used in setting gas allowables in the Appling (Segment 6, 7600', Lower) Field, such allowables being based on the average of the preceding twelve months' reservoir production.

Since I have been employed by the Commission, I know of no other instance of complaint being made by an operator that the Commission's normal procedure for determining market demand was resulting in normal capacity wells on large tracts being treated as limited capacity wells and the allowables which would have been assigned to them being credited instead to small tract wells over an extended period of time which pre-empted the operation of the allocation formula. The Aluminum Company of America application was to amend the Commission's procedure for determining maximum reasonable market demand for all reservoirs in the Appling Fields, but the evidence submitted at that time was not sufficient in the opinion of the Commission to justify applying it to all reservoirs. This is the reason the order applied only to the 5 reservoirs covered by the order.

4. The Market Demand Order does not prevent balancing of over and under-production. Any operator who under-produces during one balancing period may over-produce during the subsequent balancing period, and any operator who over-produces during one balancing period, will be required to under-produce during the next balancing period in order to balance his production against his allowables, all in accordance with the statutory provision of Section 14, Art. 6008.

5. I know of no instance in which a gas consumer has complained to the Commission that it was unable to obtain an adequate supply of gas because of reduction of gas production in any one or more reservoirs in the Appling Fields.

6. The State of Texas is divided in Districts for purposes of regulation by the Railroad Commission. Districts 2, 3 and 4 include the entire Texas Gulf Coast, and embrace

54 counties bordering on or near the Gulf Coast. Many pipeline systems traverse these Districts running generally from the Southern tip of Texas to the Houston and Upper Gulf Coast markets; and a number of them extended to the Louisiana border. There are so many of these pipelines which pick up gas from fields in this area that this area may be properly considered as a general source of supply for gas. Virtually all of the gas consumed by the Houston area and Upper Coast markets is supplied by this general source. Houston and Upper Gulf Coast area domestic, commercial and industrial consumers, together with interstate markets, constitute the major end use of gas produced in this area.

7. Mr. Parris' affidavit attached to Plaintiffs' Motion for Summary Judgment states that I read and approved the book prepared by Mr. Parris and Mr. Edgerton; when in fact, I read only parts of this book, and I had no argument with the parts I read.

Further Affiant sayeth not.

/s/ BOB R. HARRIS
Bob R. Harris

SWORN TO AND SUBSCRIBED before me this 24th day of April, 1965.

[SEAL]

/s/ ROBERT C. MCGINNIS
Notary Public in and for
Travis County, Texas

AFFIDAVIT
(Ford Affidavit)

THE STATE OF TEXAS
COUNTY OF HARRIS

BEFORE ME, the undersigned authority, on this day personally appeared KENNETH B. FORD, known to me to be a credible person, and who, after being by me first duly sworn, on his oath did depose and say:

1. I am Kenneth B. Ford. I am over twenty-one years of age and competent to testify to the facts herein set forth and make these statements of my own knowledge.

2. I am a registered professional engineer in Texas and am a member of the Society of Petroleum Engineers. I am a partner in the oil and gas consulting engineering firm of Butler, Miller and Lents. This firm was organized in May, 1948 at which time I joined the firm. During the past seventeen years, I have devoted a substantial amount of time to making gas and oil reserve studies of fields in Texas, Louisiana, Mississippi, California and other states. I have testified before the Railroad Commission of Texas and the Louisiana Department of Conservation concerning oil and gas reserves and conservation matters and before the Federal Power Commission in regard to gas reserves. In March, 1961 the Aluminum Company of America employed our firm to study certain matters relating to the multi-reservoir Appling Field, Jackson and Calhoun Counties, Texas. One purpose of this investigation was to determine the gas reserves of certain reservoirs in this field including, but not limited to, the following:

Appling (Segment 5, 7500 Foot) Field
Appling (Segment 6, 7500 Foot) Field

Appling (Segment 6, 7600 Foot) Field
Appling (Segment 6, 7600 Foot, Lower) Field
Appling (Segment A, Middle Kopnicky) Field

I made such a study at that time and have continued to study these fields up to the present date. I have also made a study, with respect to the five reservoirs referred to above, of Railroad Commission records concerning well completions, allowables, production, presssures, well producing capabilities, well bore communication, and the manner in which gas allowables are determined under Statewide Rule 31 and under Special Field Rule 11 applicable to the five reservoirs referred to above. I graduated from The University of Texas in 1940, with a B.S. degree in Petroleum Engineering, and immediately thereafter went to work for J. S. Abercrombie Company as a trainee engineer. I remained with Abercrombie until December, 1943 at which time I joined the United States Navy. During this approximate three and one-half year period as a petroleum engineer for Abercrombie, I was, among other things, engaged in the measurement of oil and gas from producing wells and the measurement and interpretation of reservoir pressure and temperature surveys. I also obtained subsurface and separator samples of hydrocarbons produced from both oil and gas wells. In addition, I set up and operated laboratory equipment that was used for determining the physical properties and phase behavior at reservoir pressure and temperature of these samples of reservoir fluids. In April, 1946, I returned to work for Abercrombie Company after being released from active duty with the Navy. I remained with this company for two years, during which time I did some engineering connected with drilling and completing gas and oil wells; however, I primarily was engaged in reservoir engineering studies concerned with the determi-

nation of gas and oil reserves of fields in the Gulf Coast Area of Texas and Louisiana.

3. Exhibit 1 attached hereto presents information regarding the reservoir gas originally in place for the five reservoirs in the Appling Fields that are subject to Special Field Rule 11, applicable to such five reservoirs. The physical factors that enter into the determination of the gas in place per acre foot of sand were determined by me from a study of the information available on these reservoirs and on similar reservoirs in other fields. I determined the total acre feet of sand for the four upper reservoirs from Mr. Werner's geological maps and from a knowledge of the net gas sand thickness of each well. For the Segment A, Middle Kopnicky Reservoir, I determined the acre feet of sand by having Mr. Werner's gas isopachous map planimetered. The total reservoir gas originally in place in each reservoir shown on Line 15 of Exhibit 1 was arrived at by multiplying the MCF of gas per acre foot shown on Line 11 by the total acre feet shown on Line 13.

4. Exhibit 2 attached hereto presents information relating to the recoverable reservoir gas originally in place in these five reservoirs. Factors utilized in my computation of the recoverable reservoir gas originally in place are shown on this Exhibit 2 and are based on my experience with these and similar reservoirs.

5. Exhibit 3 attached hereto presents information relating to gas reserves, cumulative production and depletion rates for these five reservoirs. An examination of this Exhibit shows that each of the four upper reservoirs had reported a cumulative gas production as of August 1, 1964 that greatly exceeded the original recoverable gas in these

reservoirs. For example, Segment 5, 7500 Foot Reservoir originally contained only 3,032 MMCF of recoverable gas; whereas, its reported cumulative production as of August 1, 1964 was 29,667 MMCF. This shows that the reported cumulative gas production is almost ten times as large as the recoverable gas originally in place. For the combined four upper reservoirs, there was 11,123 MMCF of original recoverable gas; whereas, they have reported as of August 1, 1964 a production of 54,783 MMCF. This reported production is about five times as large as the recoverable gas originally in place. The reported production that greatly exceeds the gas originally in place is accounted for by the widespread well bore communication (proven by Railroad Commission tests) which has permitted the production of large volumes of gas from the Segment A, Middle Kopnicky Reservoir that has been credited to these upper reservoirs. This large production of Segment A, Middle Kopnicky, gas that has been credited to the upper reservoirs has not only taken place in the communicative multiple completed wells, but from other wells without communication. This latter condition has occurred because of the flow of gas into the lower pressure upper sands from the higher pressure Middle Kopnicky sand through the communicative wells. The communication has created artificially high test rates from the upper sand completions and thereby permitted the nomination of artificially high gas volumes from such sands.

6. The apparent depletion rates (see Exhibit 3) of the upper reservoirs based on the reported production of 1963 are extremely rapid in comparison with other non-associated gas reservoirs in the State of Texas. For example, in the Segment 5, 7500 Foot Reservoir, the time required

to deplete the original recoverable gas, based on the 1963 reported production rate, was only about three-tenths (3/10) of a year. Totaling the four upper reservoirs, Exhibit 3 shows that the time required to deplete the original recoverable reserves, based on the 1963 reported gas production rate, is only about nine-tenths (9/10) of a year. An examination of Exhibit 3 shows that on an overall basis for the four upper reservoirs, the reported gas production rate for July, 1964 was very similar to the average monthly rate that existed for 1963, and that the overall apparent depletion time for these upper reservoirs as of July, 1964 was still about nine-tenths (9/10) of a year. Contrasted with the rapid depletion rate for the upper reservoirs, is the average depletion time for all non-associated reservoirs in the State of Texas for the year 1963* of 17.0 years. This means that, on an average, the four upper reservoirs in the Appling Field for the year 1963 were being depleted more than seventeen times as rapidly as the average non-associated gas reservoir in the State of Texas. The depletion rate of 17.0 years for the overall State non-associated gas reserves for 1963 is based on the remaining recoverable gas reserves as of January 1, 1963. However, due to the reported cumulative production of the upper reservoirs exceeding their original recoverable gas (and exceeding total gas originally in place for that matter) the depletion rates for these reservoirs could not be related to remaining recoverable gas but, of necessity, were related to original recoverable gas. Because this excess gas was supplied from Segment A, Middle Kopnicky Field, the combined original recoverable gas and the combined cumulative reported gas

* Most recent year for which American Gas Association gas reserves were available to me. The non-associated gas production for Texas for 1963 was obtained from Railroad Commission records.

production from the five reservoirs can be used to determine the combined remaining recoverable gas for the five reservoirs as of July 1, 1964. This remaining recoverable gas volume is 147,997 MMCF and essentially is Segment A, Middle Kopnicky gas. Based on the combined reported producing rate for 1963, the time required to deplete the remaining recoverable Segment A, Middle Kopnicky gas is only 4.13 years. Therefore, Segment A, Middle Kopnicky reservoir is being depleted more than four times faster than the average depletion rate of all non-associated reservoirs in Texas.

7. I have examined the nominations, allowables, and actual production records of these five Appling Field Reservoirs for the years 1961, 1962, 1963 and 1964. My findings from this study are set forth in Exhibit 4 attached hereto. As shown by this tabulation, there are considerable variations between nominations, allowables, and production.

8. I have examined the proration schedules of these five Appling Field Reservoirs for January, 1964 (the first month following Alcoa's hearing for determination of reasonable market demand) and found their gas allowables to be as follows:

Reservoir	Gas Allowable MCF/Day	Gas Allowable MCF/Acre/Month
Segment 5, 7500 Foot	25,258	2,347
Segment 6, 7500 Foot	3,813	615
Segment 6, 7600 Foot	1,983	1,376
Segment 6, 7600 Foot, Lower	5,816	1,105
Segment A, Middle Kopnicky	95,965	759

I have examined the January, 1964 proration schedules for all prorated non-associated gas reservoirs in Railroad

Commission Districts 2, 3 and 4 (excluding all reservoirs of the Appling Field) and found the following:

a. There are 207 non-associated gas reservoirs with reservoir allowables greater than 3,000 MCF per day. (approximate average allowable of the three smallest of the five Appling reservoirs being considered here).

b. 90% of these reservoirs have allowables less than 500 MCF per acre per month. *None* of the five Appling Field Reservoirs have allowables this low.

c. Only *two* of the 207 reservoirs have allowables greater than 1,000 MCF per acre per month; whereas, *three* of these five Appling Field Reservoirs have allowables in excess of 1,000 MCF per acre per month.

d. These five Appling Field Reservoirs, while representing only about 2% of the total prorated reservoirs in Districts 2, 3 and 4, represent 60% of all the reservoirs with allowables exceeding 1,000 MCF per acre per month.

9. I have examined the proration schedule of the five Appling Field Reservoirs for July, 1964 (the last month prior to the Commission issuing Special Field Rule 11 in which the proration schedule did not vary from normal) and found their gas allowables to be as follows:

Reservoir	Gas Allowable MCF/Day	Gas Allowable MCF/Acre/Month
Segment 5, 7500 Foot	28,411	2,628
Segment 6, 7500 Foot	3,231	618
Segment 6, 7600 Foot	3,827	2,655
Segment 6, 7600 Foot, Lower	3,701	704
Segment A, Middle Kopnicky	67,117	635

I have examined the July, 1964 proration schedules for all prorated non-associated gas reservoirs in Railroad Commission Districts 2, 3 and 4 (excluding all reservoirs of the Appling Field) and found the following:

a. There are 199 non-associated gas reservoirs with reservoir allowables greater than 3,000 MCF per day.

b. 91% of these reservoirs have allowables less than 500 MCF per acre per day. *None* of the five Appling Field Reservoirs have allowables this small.

c. None of these 199 reservoirs have allowables as great as 2,000 MCF per acre per month; however, *two* of these five Appling Field Reservoirs have allowables exceeding 2,000 MCF per acre per month. Even though these five Appling Field Reservoirs represent only about 2% of the total reservoirs in these three Railroad Commission Districts, they represent 100% of the exceedingly high allowable reservoirs in these districts.

10. For the months of January and July, 1964 the application of Special Field Rule 11 to the five reservoirs would have resulted in the following maximum reasonable market demand:

Reservoir	Maximum Reasonable Market Demand, MCF/Acre/Month	
	Jan. 1964	July, 1964
Segment 5, 7500 Foot	411	389
Segment 6, 7500 Foot	411	796
Segment 6, 7600 Foot	994	2,088
Segment 6, 7600 Foot, Lower	545	506
Segment A, Middle Kopnicky	857	765

Some of these volumes are larger than the actual assigned allowables and some are smaller. However, all these vol-

umes are far in excess of the average for all non-associated prorated gas reservoirs in Districts 2, 3 and 4, and seven of the ten volumes are greater than those assigned to 90 percent of all other reservoirs.

11. I have examined the January, 1964 proration schedules for Railroad Commission Districts 2, 3 and 4 and have found that there are 517 prorated non-associated gas reservoirs (excluding all reservoirs of the Appling Field) in these districts and that there are *only* eleven* of these reservoirs that contain small tract (two acres or less) wells with allowables and that the total of such small tract wells for these 11 reservoirs is only 26. Only five of these eleven reservoirs have more than one small tract well with allowables. On the other hand, the five Appling Field Reservoirs contain *62* small tract (two acres or less) wells with allowables. Thus, these five Appling Field Reservoirs which represent only 1% of all non-associated prorated reservoirs in Railroad Commission Districts 2, 3 and 4 contain 72% of all small tract (two acres or less) wells with allowables in these Railroad Commission Districts. The allowables situation for January, 1964 of the only five reservoirs outside of the Appling Fields that have more than one small tract (two acres or less) completion is as follows:

a. *Magnolia Beach — Kellers Bay (Foester) Field:*

4 small tract wells with allowables.
Total reservoir allowable is only 103 MCF per acre per month.

---

* Does not include three reservoirs (Normanna, Port Acres and Alta Loma, West) that have small tract wells, in which reservoirs the small tract wells are assigned small special allowables.

b. *Fulton Beach (A-2) Field:*

2 small tract wells with allowables.
Total reservoir allowable is only 26 MCF per acre per month.

c. *Hidalgo (El Taxano, Upper) Field:*

6 small tract wells with allowables.
Total reservoir allowable is only 125 MCF per acre per month.

d. *Hidalgo (Hackney) Field:*

6 small tract wells with allowables.
Total reservoir allowable is only 144 MCF per acre per month.

e. *McAllen (Hansen) Field:*

2 small tract wells with allowables.
Total reservoir allowable is only 195 MCF per acre per month.

In Section 8 of this Affidavit the allowables for the five Appling Reservoirs are shown to range from 615 to 2,347 MCF per acre per month, which are 3 to 12 times larger than the maximum allowable of the above fields.

1. I have examined the July, 1964 proration schedules of all non-associated gas reservoirs in Railroad Commission Districts 2, 3 and 4 and found that there were 549 such reservoirs receiving allowables. There are only twelve* of these reservoirs containing small tract (two acres or less)

* Does not include three reservoirs (Normanna, Port Acres and Alta Loma, West) that have small tract wells, in which reservoirs the small tract wells are assigned small special allowables.

wells with allowables and there are a total of only 30 small tract wells receiving allowables. On the other hand, in these five Appling Field Reservoirs that represent only 1% of the total non-associated gas reservoirs receiving allowables in Districts 2, 3 and 4, there were 60 small tract (two acres or less) completions with allowables. Therefore, these five Appling Reservoirs, while representing only 1% of the reservoirs in these districts contain 67% of the small tract (two acres or less) wells with allowables in these districts. The allowable situation for July, 1964 of the only five reservoirs outside of the Appling Fields that have more than one small tract (two acres or less) completion is as follows:

a. *Magnolia Beach — Kellers Bay (Foester) Field:*
   5 small tract wells with allowables.
   Total reservoir allowable is only 111 MCF per acre per month.

b. *Fulton Beach (A-2) Field:*
   2 small tract wells with allowables.
   Total reservoir allowable is only 33 MCF per acre per month.

c. *Hidalgo (El Taxano, Upper) Field:*
   6 small tract wells with allowables.
   Total reservoir allowable is only 69 MCF per acre per month.

d. *Hidalgo (Hackney) Field:*
   6 small tract wells with allowables.
   Total reservoir allowable is only 136 MCF per acre per month.

e. *McAllen (Hansen) Field:*
   2 small tract wells with allowables.
   Total reservoir allowable is only 204 MCF per acre per month.

In Section 9 of this Affidavit, the allowables for the five Appling Reservoirs are shown to range from 618 to 2,655 MCF per acre per month, which are 3 to 13 times larger than the maximum allowable of the above fields.

13. My study of producer's forecasts, allowables, and production for small tract wells (two acres or less) in these five reservoirs shows that at the present time and for the past several years, these operators of small tract wells, with few exceptions, have been nominating and/or receiving allowable for and/or producing each month more gas than was originally in place under their tracts in these reservoirs.

14. Based on the facts presented in this Affidavit, it is clear that the special conditions that exist in these five Appling Field Reservoirs do not exist outside the Appling Field in any reservoir in Railroad Commission Districts 2, 3 and 4 and that statewide procedure as outlined in Statewide Rule 31 is not adequate for these special conditions. For this reason, Special Field Rule 11 written by the Commission is reasonably necessary for effective and fair regulation in these fields.

Further Affiant sayeth not.

/s/ KENNETH B. FORD
Kenneth B. Ford

SWORN TO AND SUBSCRIBED before me this 24th day of April, 1965.

/s/ CAROL BOHN
Notary Public in and for
Harris County, Texas

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 717

ALUMINUM COMPANY OF AMERICA, ET AL.,
Petitioners,

v.

WOODS EXPLORATION AND PRODUCING CO., INC. ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

BRIEF OF RESPONDENTS WOODS EXPLORATION AND PRODUCING CO., INC., SOUTHEASTERN PIPE-LINE COMPANY, BEN NOVAK AND CLAIRE BENZ-STODDARD IN OPPOSITION

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Woods Exploration and Producing Co., Inc., Southeastern Pipeline Company, Ben Novak, and Clarie Benz-Stoddard, Respondents, respectfully submit this Brief in opposition to the Petition for Writ of Certiorari filed herein by Petitioners.

OPINIONS BELOW

The opinion of the Supreme Court of Texas in this case is correctly identified in the Petition and is copied in Appendix "D" to the Petition. Likewise, the dissenting opinion of Mr. Justice Smith, in which Mr. Justices Hamilton and Norvell joined, is correctly identified in the Petition and copied therein as Appendix "E" and the dissenting opinion of Mr. Justice Hamilton, in which Mr. Justices Smith and Norvell joined, is correctly identified in the Petition and copied in Appendix "F" thereto.

JURISDICTION

Respondents submit that this Honorable Supreme Court of the United States has no jurisdiction to review the Judgment of the Supreme Court of Texas in this cause under Section 1257 (3) of Title 28, United States Code, because:

(a) Petitioners have waited too long to make their claim that Section 12 of Article 6008, Revised Civil Statutes of Texas, is repugnant to the Constitution of the United States since such claim was first made by Petitioners in their Motion for Rehearing filed in the Supreme Court of Texas after judgment;

(b) The Judgment of the Supreme Court of Texas is not "final" within the meaning of Section 1257, Title 28, United States Code, as interpreted by this Court.

(a) Petitioners' constitutional claims not timely presented.

The basis of the Petition for Writ of Certiorari is that the decision of the Texas Supreme Court in this case holding the Railroad Commission Order in question violative of and beyond the power of the Commission under Section 12 of Article 6008, Revised Civil Statutes of Texas, construes and applies such statute so as to deny Petitioners the equal protection of the law and takes Petitioners' property rights without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. The Petitioners at no point raised their claim that such statute was repugnant to the Federal Constitution until their Motion for Rehearing filed with the Supreme Court of Texas following such Court's decision in this case. Yet Petitioners at Pages 6 and 7 of their Petition for Writ of Certiorari make the following statement:

"*The District Court* and the majority opinion of the Supreme Court of Texas construe Section 12 in their

> isolation as prohibiting the Railroad Commission of Texas from fixing a ceiling on gas reservoir production allowable in any amount less than the total amount which can be sold from the reservoir for lawful end uses even though a lower maximum ceiling was admittedly necessary to protect Petitioners' correlative rights to gas in the common reservoir from violation by Respondents and in order to prevent the confiscation of vast quantities of Petitioners' gas by Respondents through tremendous drainage of gas from under Petitioners' lands." (emphasis added)

While Respondents do not agree with all of the statements contained in this paragraph from the Petition, it does show that Petitioners correctly recognize that the Judgment of this District Court was subject to the same complaint by Petitioners as was the decision of the Supreme Court of Texas. The Judgment of the District Court held that the Commision's Order in question was invalid because violative of and beyond the powers of the Commission under Section 12 of Article 6008, Revised Civil Statutes of Texas (See copy of Judgment of District Court attached as Appendix A, Page 1-A of Petition for Writ of Certiorari). It is this same action by the Supreme Court of Texas which Petitioners claim presents the Federal Constitutional question here (See topic "Question Presented" on Page 4 of Petition for Writ of Certiorari).

In the hearing on Respondents' Motion for Summary Judgment in the trial court, Petitioners presented affidavits supporting their contentions of confiscation of their gas by the small tract wells and that the new Railroad Commission Order would reduce such confiscation (Tr. 230, 233, 239, 252). The trial court granted Respondents' Motion for Summary Judgment (Tr. 288). Under Texas law the trial court, in considering a motion for summary judgment, views the facts together with every reasonable inference deductible

therefrom in the light most favorable to the party opposing the motion. *Womack* v. *Allstate Insurance Co.*, 296 S.W. 2d 233 (Tex. Sup. 1956). Also under Texas law the Appellate Court in reviewing a summary judgment against a party will assume his affidavits in opposition thereto to be true. *Cowden* v. *Bell*, 300 S.W. 2d 286 (Tex. Sup. 1957). Thus Petitioners' statement on Page 19 of their Petition that until the Opinion of the Supreme Court there had been no fact finding of confiscation is incorrect.

In the light of the above, Respondents submit that Petitioners have wholly failed to properly present their constitutional claims in such a manner as to be considered by the Supreme Court of the United States, and having so failed to present such claims this Honorable Court has no jurisdiction to now consider them. *Bowe* v. *Scott*, 233 U.S. 658 (1914). It is well established that the United States Supreme Court will not consider constitutional claims first presented on a motion for rehearing in the state court of last resort when such court does not decide such claims. *Radio Station WOW* v. *Johnson*, 326 U.S. 120 (1945); *Herndon* v. *State of Georgia*, 295 U.S. 441 (1935); *Chicago, I. & L. Ry. Co.* v. *McGuire*, 196 U.S. 128 (1905). In fact, it has even been held that, if a United States constitutional claim first arises as a result of the decision of the court of last resort, it is too late to make the constitutional claim on the motion for rehearing in that court if the action of the court could have been anticipated. See *Herndon* v. *State of Georgia, supra.* However, despite Petitioners' tortuous reasoning to the contrary, the constitutional claim here presented by the Petitioners could have been presented at the Motion for Summary Judgment stage in the trial court or, certainly at the latest, on their appeal to the Supreme Court of Texas. The Supreme Court of Texas in its majority opinion stated that the question to be decided "is whether the Commission

may, for the purpose of protecting correlative rights, establish a ceiling on the monthly allowable of gas to be produced from a reservoir." This is necessarily the same question decided by the trial judge when he held that such was not within the statutory authority of the Railroad Commission. As shown above, his decision was rendered with the assumption that the drainage as alleged by Petitioners did in fact exist. He further made such decision in the face of the undisputed fact that the purpose of the Commission's new Order was to protect correlative rights since this was shown by Petitioners' affidavit and is in fact recited in the Order itself as its purpose. (Tr. 72-75).

In summary Respondents would point out that no discussion of any constitutional issue now attempted to be raised by Petitioners is to be found in the opinion of the Texas Supreme Court. No attempt to raise any such constitutional issues was made by Petitioners prior to their Motion for Rehearing filed in the Texas Supreme Court. No opinion was rendered by the Texas Supreme Court in its Order dated July 27th, 1966, overruling Petitioners' Motion for Rehearing. Because of these facts Respondents respectfully submit that this Court has no jurisdiction to grant the Petition for Writ of Certiorari because of the rule established by such cases as *Bowe* v. *Scott, supra*, where it was stated:

> "It is further urged that, * * *, there is no jurisdiction because no assertion of rights under the Constitution was made below until the petition for rehearing, which was too late, and the tardiness of which was not saved by the action of the court, since it simply declined to grant the rehearing without deciding the questions presented as the basis of the request for rehearing. As it is elementary that a mere assertion in a state court of a right under the Constitution of the United States in a petition for rehearing affords no

> ground for invoking the jurisdiction of this court unless the court below, in dealing with the petition for rehearing, considers and passes upon the Federal ground therein relied upon, we dismiss that subject from view * * *" Page 771

(b) The Judgment of Supreme Court of Texas not final.

It is settled law in Texas that the courts are not empowered to write an order for the Railroad Commission. As was stated in *Halbouty* v. *Railroad Commission*, 357 S.W. 2d 364 (Tex. Sup. 1962):

> "All parties, of course, concede that the court is not empowered to direct the Commission as to the nature or terms of its order or what weight should be given to the several allowed factors. We are limited to passing upon the validity of the order as promulgated." Page 573-574.

In the instant case the majority opinion of the Supreme Court of Texas stated:

> "We do not mean to suggest that reasonable market demand must always be fixed at the mathematical total of the producer's forecast for the month. Use of these nominations is merely an administrative device, and the Commission may consider and give appropriate weight to all facts that are relevant to the determination of reasonable market demand. (See page 17-A of Appendix to Petition.)"

All the Supreme Court of Texas has done in this case is to strike down the new procedure for setting reservoir allowables because it set an arbitrary limit on reasonable market demand based upon factors having nothing to do with reasonable market demand. The effect of the decision of the Texas Supreme Court is to send this controversy back to the Railroad Commission for a new and proper

order within the statutory limits as established by the Legislature. Thus Petitioners' complaint is not with what the Supreme Court of Texas has done but with what the Railroad Commission of Texas may do, and thus is premature. See *Hunter Co.* v. *McHugh*, 320 U.S. 222 (1943); *Republic Natural Gas Co.* v. *State of Oklahoma*, 334 U.S. 62 (1948). This Court stated in *Hunter Co.* v. *McHugh*, *supra*:

> "In the present posture of the record, so far as the appeal seeks to bring before us for review the judgment of the state court sustaining the constitutionality of the statute, the record presents no substantial federal question. * * * On this appeal, absent from the record any operative order implementing Act No. 157, we cannot say that the application of the Act can be enjoined as invalid on its face, for we cannot say that no order could be made by the Commissioner which would apportion the production and distribute the costs of production and of the apportionment in a manner which would be consonant both with the requirements of the statute and the Federal Constitution * * * It will be time enough to consider the constitutionality of any particular apportionment and distribution of costs when we have before us the specific provisions of an order directing them which has been subjected to the scrutiny of the state court." Page 228.

In their Petition the Petitioners attempted to construe much of the language in the Opinion of the Supreme Court of Texas and emphasized certain language which was not necessary to the Court's judgment. This Court has held that it reviews judgments, not statements and opinions. *Black* v. *Cutter Laboratories*, 351 U.S. 292 (1956); *Hurb* v. *Pitcairn*, 324 U.S. 117 (1945). In *Hurb* v. *Pitcairn*, *supra*, this Court stated:

> "This Court from its foundation has adhered to the principle that it will not review judgments of the state

courts that rest on adequate and independent state grounds. * * * Our only power over state judgments is to correct them to the extent they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its view of federal laws, our review could amount to nothing more than an advisory opinion." Page 125-126

There is, of course, no Federal question involved insofar as whether or not the Legislature has delegated particular powers to the Railroad Commission. *State of Minnesota* v. *Probate Court,* 309 U.S. 270 (1948).

STATEMENT OF THE CASE

Respondents, in their argument under "JURISDICTION", *supra,* point out in what respects they differ with that portion of Petitioners' STATEMENT OF THE CASE relative to the question of whether or not Petitioners have timely made their constitutional claims and have also included there pertinent facts relative to this question of jurisdiction which are omitted from Petitioners' STATEMENT OF THE CASE. Therefore, Respondents' Statement of the Case will be confined to facts relative to the merits of Petitioners' alleged constitutional question presented.

Benz-Stoddard v. *Aluminum Company of America,* 368 S.W. 2d 94 (Tex. Sup. 1963), discussed on Pages 8 and 9 of the Petition, did hold that because the applicable Texas Statutes authorized the Railroad Commission to treat a completion in each reservoir as one well, the Respondent Benz-Stoddard was entitled to a completion in each reservoir. But Petitioners fail to point out here that the Supreme Court of Texas held that Benz-Stoddard was entitled to a

completion in each reservoir in order to prevent confiscation of the gas underlying her land in each of the reservoirs in which a completion was allowed. The Court stated:

> "We hold, therefore, that since the Commission is authorized to treat each completion in a separate reservoir as a separate well, it may grant multiple completions in each reservoir in which it finds there will be confiscation. The allegation that under the existing proration order Petitioner will recover more gas from her land through one completion than underlies her land in all the reservoirs does not amount to a denial of the presumed finding by the Commission that there will be confiscation in each reservoir." Page 368

On Page 11 of Petitioners' Petition they assert that in *Railroad Commission* v. *Aluminum Company of America*, 380 S.W. 2d 599 (Tex. Sup. 1964), the Supreme Court of Texas held that Petitioners were precluded by "lapse of time" from attacking the ⅓-⅔ allocation formula in effect in Appling Field. The opinion of the Supreme Court in that case dealt with considerably more than Petitioners' lapse of time in attacking the allocation formula. On Page 603 of the opinion the Court pointed out that at the time of the first allocation formula in 1956 five wells have been drilled on small tracts, but that by 1959 thirty small tract (Rule 37 exceptions) wells had been completed in the Field and it was not until this time that Alcoa first took any action to set aside the allocation formula claiming it was confiscatory. The Court also points out on page 603 of its opinion that the cost of the thirty wells ranged from $90,000.00 to $200,000.00 each. The Court further found that in 1956 Alcoa had sufficient information available to them to conclude that many of the town lots lay within the then proven territory, and that as a matter of law, Alcoa knew that these town lots would be entitled to Rule

37 exception permits. The Court also took note of the fact that Alcoa and its associates had refused offers to pool or unitize from some small tract owners and that several of these small tract owners' gas was being drained by the surrounding five wells belonging to Alcoa. Additionally, on page 604 of the opinion the Court stated:

> "There are many reasons why stability in respect to proration formulas is vital to the well-being of the industry as a whole, to the property owners in the field and to the public at large. It is a matter of common knowledge that well owners are not alone concerned. Individuals and institutions have invested in royalties and in other oil and gas interests. Loans have been made with these properties as security, and taxes have been levied by various municipal and school authorities. It is well known that the economy of the whole State rests to a large extent on the oil and gas business." Page 604

Thus it can be seen that it was not, as Petitioners would have this Honorable Court believe, mere lapse of time on their part in attacking the allocation formula which led the Supreme Court of Texas to uphold the validity of such formula. Rather to a very large extent the Judgment of the Court was based upon weighty equities existing in favor of the small tract owners.

Petitioners have again, as they did in their Briefs in the Supreme Court of Texas, devoted much space to citing the evils of well bore communication between reservoirs in an attempt to justify the arbitrary market demand order when the effect of such well bore communication has been eliminated in another separate Railroad Commission proceeding which had nothing to do with market demand. The Railroad Commission has merged and consolidated all the Appling Field sands in which well bore communications have been alleged. (Oil & Gas Docket No. 2-53,786 and No. 2-54,578,

Order dated August 10, 1965). Petitioners did not deny this when brought to the attention of the Supreme Court of Texas and this Court is entitled to take judicial knowledge of this fact. In fact, Petitioners admitted it in their Reply Brief filed after oral argument in the Supreme Court of Texas (See Pages 9-11 thereof). The point is that the proceeding for determination of market demand is not a proper place to eliminate any evils which may result from well bore communications — that the latter is not relevant to a determination of reasonable market demand. No loss to any one now exists by natural or artificial well bore communications. Under the merger, there is only one allowable to each well, no matter how many multiple completions were made. Petitioners may accuse us of going outside the record on this subject, but this Court is entitled to know that any attempt to base constitutional questions on well bore communications is without merit.

The normal procedure for determining market demand is based upon nominations or producers' forecasts of operators in the field limited by their ability to produce. This procedure has been in effect in one form or another since the inception of the Appling Field, and is set out as an attachment of the Motion for Summary Judgment filed by Respondents in the trial court (Tr. 70-71).

In reply to Respondents' Request for Admissions, filed prior to the trial in the District Court, the following was undisputed (Tr. 272-278):

(1) Sections (c) and (e) of the Commission's Statewide Rule 31 governs the normal manner in which reasonable market demand, and hence the total monthly gas allowable for each individual gas reservoir is determined. The primary basis for this normal determination is the total of the producers' forecast filed by the operators having wells

completed in each reservoir stating the volume of gas each producer expects to be able to market the following month from each of his wells.

(2) The normal procedure set forth above has been followed generally in the non-associated gas reservoirs of the State for many years, and is still followed in the remaining reservoirs of the Appling Fields, except for such reservoirs as were subject to the Order held invalid by the Supreme Court of Texas.

(12) The present instance is the first time that the amended procedure has been used by the Railroad Commission of Texas.

On Page 12 of their Petition, Petitioners state that since the decision in *Railroad Commission* v. *Aluminum Company of America* in 1964, confiscation of their gas has been increased as a result of well bore communications. However, the opinion of the Texas Supreme Court in this case states that:

> "A 1961 study disclosed that drainage was taking place from the Middle Kopnicky to the smaller upper zone sands through well bore communication in the wells with multiple completions." (See Page 9-A of Appendix to Petition)

Also one of Petitioners' own affidavits, copy of which is attached to their Petition, states that commencing in 1961 the Commission first tested for well bore communication and that such well bore communication between reservoirs has been a continuing problem in the Appling Field (See Pages 53-A and 54-A of Petition).

Lest the Court think that Respondents are making much ado about unsubstantial results from the Railroad Commission's new procedure for setting reservoir allowable,

it is felt that an example of the result to Respondents should be pointed out. Under this new procedure Respondent Woods Exploration and Producing Co., Inc.'s production in the Appling Field has been reduced to a mere fraction of what it was under the prior procedure. As is shown by Attachment "B" to the Affidavit of Robert E. Parris, an expert on gas proration, under this amended procedure for determining market demand in December, 1964, Aluminum Company of America lost 3.2% of their customary allowable and Respondent Woods lost 93.4% of their customary allowable which would have been received under the prior Commission procedure (Tr. 97).

RESPONDENTS' REPLY TO PETITIONERS' REASONS FOR GRANTING THE WRIT

I.

Petitioners, and others like them claiming confiscation of oil and/or gas from under their property, are furnished under the applicable Texas statutes an adequate remedy but Petitioners, because of the equities in favor of others in the Appling Field and because of their own laches, have been barred from pursuing this remedy.

Railroad Commission Rule 5, the proration formula in Appling Field by which the monthly allowable is allocated to the various wells in the Field, provides as follows:

> "RULE 5. The daily allowable production of gas from individual wells completed in a non-associated gas reservoir of the subject field shall be determined by allocating the allowable production *after deductions have been made for wells which are incapable of producing their gas allowables,* among the individual wells in the following manner:
>
> (1) Two-thirds (⅔) of the allowed gas production from a non-associated gas reservoir shall be allocated

to the individual wells completed therein in that proportion that the acreage assigned to each well bears to the sum of the acreage of the reservoir.

(2) One-third (⅓) of the allowed gas production from a non-associated gas reservoir shall be allocated equally among the individual wells completed therein.

(3) The total daily non-associated gas allowable for each well shall be the sum of its acreage and per well allowable." (emphasis added)

It can be seen that it is this proration formula which contains the provision whereby the excess allowable which is assigned to Petitioners' wells and which they are not capable of producing is re-assigned to other wells in the field. It is this reassignment of allowables which Petitioners cannot produce of which they complain. The sole purpose of the amended procedure for determining field allowable in the Appling Field was to eliminate or render negligible any allowable which could be so reassigned.

Recognizing their remedy for claimed confiscation a suit was brought by some of the Petitioners herein and others to set aside and have declared invalid the proration formula in Appling Field. In *Railroad Commission* v. *Aluminum Company of America et al.* 380 S.W. 2d. 599 (Tex. Sup. 1964), the Texas Supreme Court held the Commission's Rule 5 to be valid because of Aluminum Company of America, et al's unreasonable delay in seeking to have it set aside. The Court first referred to its dictum in a prior case to the effect that "where producers have acquiesced in and failed to complain of the Commission's proration orders for a long period, during which time other operators have expended vast sums in exploration and drilling operations, such producers should not be heard to complain."

The Court further stated in that Opinion that:

> "There are many reasons why stability in respect to proration formulas is vital to the well-being of the industry as a whole, to the property owners in the field and to the public at large. It is a matter of common knowledge that well owners are not alone concerned. Individuals and institutions have invested in royalties and in other oil and gas interests. Loans have been made with these properties as security, and taxes have been levied by various municipal and school authorities. It is well known that the economy of the whole State rests to a large extent on the oil and gas business." Page 604

In their Petition for Writ of Certiorari, Petitioners, while asserting that *Railroad Commission* v. *Aluminum Company of America, et al, supra,* works a grave injustice upon them, have neglected to tell the Court that in the Appling Field (1) the small tract owners attempted to pool and unitize their tracts with Aluminum Company of America and were refused, (2) Petitioners had these small tracts surrounded by four or five wells and were draining the gas from under the small tracts and not paying the small tract owners anything, (3) Petitioners in 1956 knew that in all probability the Railroad Commission would give relief to the small tract owners by granting them Rule 37 permits to drill their tracts under the circumstances, and (4) the fact is, Petitioners waited over four years to complain of the ⅓-⅔ proration formula and until over thirty wells were drilled on the small tracts under Rule 37 permits, which wells cost between $90,000 and $200,000 each. See *Railroad Commission* v. *Aluminum Company of America, supra,* at Pages 603 and 604. In view of these equities existing in favor of the small tract owners, the Supreme Court of Texas held in that case that Petitioners had waited too long to complain of the proration formula. This decision was not contrary to the

earlier cases of *Atlantic Refining Co.* v. *Railroad Commission,* 346 S.W. 2d 801 (Tex. Sup. 1961), and *Halbouty* v. *Railroad Commission,* 357 S.W. 2d 364 (Tex. Sup. 1962, writ of cert. denied, 371 U.S. 883), both of which held invalid ⅓-⅔ proration formulas in other fields, because both of those cases excepted such a fact situation as exists in the Appling Field from the effect of the holdings therein. For example, in *Atlantic Refining Co.* v. *Railroad Commission, supra,* the Court stated:

> "We are in agreement • • • that where producers have acquiesced in and have failed to complain of the Commission's proration orders for a long period, during which time other operators have expended vast sums in exploration and drilling operations, such producers should not be heard to complain." Page 811

And in *Halbouty* v. *Railroad Commission,* 357 S.W. 2d 364 (Tex. Sup. 1962), the Court stated:

> "This does not mean and we are not to be understood as foreclosing the power of the Commission, by proper order or exception, to allow the holder of a Rule 37 permit to recover a sufficient amount of oil or gas to repay drilling and production costs and provide a reasonable profit when no other means of recovering the minerals which underlie his land are available. No such problem is before us." Page 376

In *Railroad Commission* v. *Shell Oil Co.,* 380 S.W. 2d 556 (Tex. Sup. 1964), cited by Petitioners and decided the same day as *Railroad Commission* v. *Aluminum Company of America, supra,* the Texas Supreme Court held invalid a ⅓-⅔ proration formula in another field because the equities as above set out existing in favor of the small tract owners were not present in the field involved in that case.

The Supreme Court of Texas has, prior to this date, recognized that under the applicable oil and gas statutes of this State the Legislature has provided that proration of the field or reservoir, allowable among the wells is the method whereby correlative rights can be protected. For instance in *Atlantic Refining Co.* v. *Railroad Commission*, 346 S.W. 2d 801 (Tex. Sup. 1961), it was stated that:

> "The responsibility rests with the Commission to devise some rule of proration which will conserve the gas in the field in question and at the same time be fair and just to all parties without depriving any of them of his property." Page 812

The majority opinion in the instant case states that:

> "The Legislature undoubtedly contemplated that each well would receive its fair share of the gas produced, but it also specified the means by which that end is to be accomplished." (See Appendix, Page 16-A, Petition for Writ of Certiorari)

Thus under the Texas oil and gas statutes Petitioners are afforded an adequate remedy for any claimed confiscation. Certain statements in the Petition show that Petitioners recognize that it is the re-assignment of excess well allowables that their wells are incapable of producing which results in any confiscation of their gas and that their proper remedy for this situation was recourse to the Commission to secure a change in the allocation formula. For instance Petitioners state that "such excess under the Railroad Commission's field rules being assigned to the Respondents' town lot wells, thereby permitting them to drain still greater quantities of Petitioners' gas. * * * 530,000 MCFs of gas that this large tract well was unable to produce was allotted under the Commission procedure to Respondents' seventeen town lot wells, enabling them to confiscate and convert to their own use that amount of

Petitioners' gas in a single month!" (Page 13 of Petition). And again "Petitioners could not obtain relief from the pillaging of their property by petitioning the Railroad Commission for modification of the ⅓-⅔ allocation formula governing individual well allowables, e.g., converting to a straight acreage basis for a reduced percentage to the wells and an increased percentage to the acreage, because the ⅓-⅔ allocation formula had been judicially frozen against Petitioners by the Texas Supreme Court's decision in Railroad Commission v. Aluminum Company of America * * *" The fact that Petitioners through their own neglect in failing to timely pursue this remedy and the fact that certain equities existing in favor of the small tract owners in the Appling Field have resulted in this remedy being unavailable to Petitioners does not in anywise create a constitutional issue for consideration by this Honorable Court. Petitioners do not have a constitutional right to be afforded a remedy for confiscation of their gas at every step in the regulatory process as established by statute and Railroad Commission action pursuant thereto. It is sufficient that the pertinent statute, Section 12 of Article 6008, by providing that:

> "The monthly reservoir allowable shall be *allocated* among all wells entitled to produce gas therefrom so as to give each well its fair share of the gas to be produced from the reservoir * * *" (emphasis added)

secures to Petitioners a means by which to be protected from confiscation.

It is well established that a person has no constitutional right to any particular form of remedy but rather one's only guarantee under the Fourteenth Amendment is the furnishing of some effective procedure which will preserve

his substantial right to redress. In *Gibbes* v. *Zimmerman*, 290 U.S. 326 (1933) this Court stated that:

> "* * * The appellant has no property, in the constitutional sense, in any particular form of remedy; all that he is guaranteed by the Fourteenth Amendment is the preservation of his substantial right to redress by some effective procedure." Page 332

In *Hardware Dealers Mut. Fire Ins. Co. of Wisconsin* v. *Glidden Co.*, 284 U.S. 161 (1931), it was held that:

> "In the exercise of that power and to satisfy a public need, a state may choose the remedy best adapted, in the Legislative judgment, to protect the interest concerned, provided its choice is not unreasonable or arbitrary, and the procedure it adopts satisfies the constitutional requirements of reasonable notice and opportunity to be heard." Page 158

II.

Petitioners' true complaint is that under Section 12 of Article 6008 the Railroad Commission is not allowed to arbitrarily restrict market demand to protect them from the acts of private individuals and such complaint does not raise a constitutional issue.

The Petitioners are complaining of a statute, Section 12 of Article 6008, Texas Revised Civil Statutes (1962), by which the Legislature of the State of Texas has delegated to the Railroad Commission the authority to fix the monthly reservoir allowable of gas to be produced from a reservoir. Petitioners complain because, as they say, under the holding of the majority opinion of the Supreme Court of Texas in this case the Legislature did not authorize production from a reservoir to be limited to less than reasonable market demand, except for the prevention of waste, and that the protection of correlative rights cannot be used by the Commission to set an arbitrary maximum limit

on reasonable market demand. Yet, if the Commission had not been delegated by the Legislature the power and authority to set reservoir allowable, any drainage suffered by Petitioners would be equal to or worse than what it was under the former method of setting reservoir allowable, Statewide Rule 31, since the wells could produce their capacity. For example, in the month of July, 1964, the total delivery capacity of the eighteen wells completed in Segment 5, 7500′, was approximately 898,000 MCFs, but the production forecasts resulted in the determination that reasonable market demand, and hence the reservoir allowable, for the month was approximately 880,000 MCFs (See Majority Opinion of the Supreme Court of Texas, Appendix D to Petition, Pages 10-A and 11-A thereof). In effect what Petitioners are contending is that Section 12 of Article 6008 denies them the equal protection of the laws and takes their property without due process of law, because under such statute the Commission is not allowed to take affirmative action, by limiting reservoir allowable, to protect Petitioners from drainage of their gas by the acts of private individuals. However, the action inhibited and the protection afforded by the first section of the Fourteenth Amendment to the Constitution of the United States applies only to action by the state and not by private individuals. See *Shelley* v. *Kraemer*, 334 U.S. 1 (1948); *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1954). Any drainage suffered by Petitioners is the result of one thing and one thing only, and that is, Appling Field Rule 5 (the allocation formula) which first divides the reservoir allowable on the basis of one-third to the wells and two-thirds to acreage, and second, assigns that portion of the allowable that any well receives thereby but cannot produce because of limited capacity, to the remaining wells which under the allocation formula have not been assigned their maximum capacity.

It is submitted that Petitioners' entire argument is an exercise in sophistry because of their contention that as a result of the opinion of the Supreme Court of Texas holding that under Section 12 of Article 6008 the Commission has not been given the power to limit reasonable market demand so as to protect correlative rights, the statute results in confiscation of their property in violation of due process and equal protection clauses of the United States Constitution. This they contend in face of the fact that if the Railroad Commission had not been delegated the authority by the Legislature to set reservoir allowables, drainage of Petitioners' gas as a result of each well being able to produce its capacity would be equal to or greater than what it was under the former method of determining reasonable market demand, as pointed out above. It has been held that:

> "A statute is not invalid under the Constitution because it might have gone farther than it did, or because it may not succeed in bringing about the result that it tends to produce." *Roschen* v. *Ward,* 279 U.S. 336 (1929) Page 336

Also:

> "A state may 'direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so nonetheless but the forbidden act does not differ in kind from those that are allowed'." *Hughes* v. *Superior Court,* 339 U.S. 460 (1950) Page 468

On Page 23 of their Petition, Petitioners cite and quote from *Sterling* v. *Constantin,* 287 U.S. 378 (1932). This was a suit seeking an injunction restraining the Governor of Texas and other officials from enforcing their military or executive orders restricting the production of oil from the

plaintiff's wells. Plaintiff had previously brought suit to restrain the enforcement of orders of the Commission limiting the production of oil. After the Commission was so enjoined, the Governor issued orders to the military authorities of the State to limit the production of oil in the subject field to a certain number of barrels per day per well. The Supreme Court affirmed the District Court's issuance of an injunction restraining the action of the State officials because:

> "Plaintiff had a constitutional right to resort to the Federal Court to have the validity of the Commission's orders judicially determined. There was no exigency which justified the Governor in attempting to enforce by executive or military orders the restriction which the District Judge had restrained pending proper judicial inquiry. * * * It is also plain that there was no adequate remedy at law for the redress of the injury * * *" Page 197

The *Sterling* case also differs from the instant case in that there the plaintiff was complaining of actions of the State authorities restricting their production of oil, whereas here Petitioners are not complaining of restriction of production but are in fact contending their constitutional rights are violated because production is not restricted in order to protect them from drainage of their gas by the acts of private individuals.

Thompson v. *Consolidated Gas Utility Corp.*, 300 U.S. 55 (1936), discussed and quoted from on Pages 23 and 24 of the Petition, likewise involved an attack on an order of the Railroad Commission limiting production. Again this was not a case where the complainants contended that their constitutional rights were violated because under a state statute the administrative agency was not delegated the power to protect them in their property from the act of

private individuals. Nor were they complaining of the administrative agency's failure to restrict production but rather of its restriction of production.

Mars v. *Railroad Commission*, 177 S.W. 2d 941 (1944), discussed on Pages 25 and 26 of the Petition, did not hold at Petitioners state "that a Railroad Commission order which permitted one producer's gas to be drained and confiscated by another producer contravened the Fourteenth Amendment." This was again a case where the Commission's order did not merely allow such confiscation to take place, but rather caused it, and again by the restriction of production. As the Court there in its opinion stated the suit was brought to test the validity of the Commission's proration orders and as "a bill of equity to restrain the Commission from restricting production in the field in such a manner as to constitute a taking of plaintiff's property without due process of law." Page 943. There the complainant's production had been restricted by an order of the Commission to such an extent that numerous protective wells drilled primarily to prevent drainage of complainant's oil from the high pressure area underlying their land to low pressure areas outside their land were rendered ineffective for such purpose. The Commission's order thereunder attacked so restricted complainant's production that it considerably increased this drainage and it was undisputed that the order was not necessary to prevent waste.

In summary the primary object of gas proration is to see that the market demand for gas from the reservoir is met, and that each operator is given an equal opportunity to produce his share of this demand limited only by the proration formula or *the ability of his well to produce.* The Supreme Court of Texas in this case recognized this when

it stated after discussing how the allocation formula divides the reservoir allowable among the wells, that:

> "Subject to any inequities inherent in the allocation formula, each well thus receives its fair share of the gas produced *provided all wells are capable of producing their allowables.* A well incapable of producing the allowable that would normally be assigned to it is known as a limited capacity well." (Pages 8-A and 9-A of Appendix to Petition) (emphasis added)

There can be no doubt that the Petitioners received an assignment of their proportionate part of reservoir allowable based on the ⅓-⅔ allocation formula. They contend even this is unfair because the ⅓-⅔ allocation is in itself confiscatory, but however this may be, they have been held to be barred from attacking it. But now they contend that because their wells are incapable of producing the portion of the reservoir allowable assigned them, and because their laches have prevented them from securing an allocation of the reservoir allowable that will eliminate or substantially reduce drainage from under their land, Section 12 of Article 6008 is unconstitutional because under it the Railroad Commission is not allowed to arbitrarily limit market demand and hence reservoir allowable to the point where no more allowable is assigned to their wells than they can produce.

The Petitioners should have raised the constitutional question of drainage and applied for, Writ of Certiorari to the United States Supreme Court from the decision in the case of *Railroad Commission* v. *Aluminum Company of America, et al., supra,* if they felt there was excess drainage in the Appling Field. Having failed to do so when the point was directly in issue in the case in 1964, it is too late now, two and one-half years later, to try to raise it indirectly in a collateral case.

CONCLUSION

Petitioners throughout their Petition, in one form or another, attempt to support their position that Section 12 of Article 6008, results in confiscation of their gas because under the holding of the Supreme Court of Texas the Railroad Commission is not allowed to set an arbitrary ceiling on reservoir allowables and thus restrict them to a point that their wells will produce all or substantially all of the proportionate part of the allowables they receive under the allocation formula and there will be no excess allowables to re-assign as provided for in the allocation formula. However, Respondents submit that they have shown that Section 12 of Article 6008, insofar as it concerns the duty delegated to the Railroad Commission to set reservoir allowables, although it may not prevent drainage in some cases when those claiming such drainage have failed to properly pursue and secure the remedy provided by statute (change in allocation), it in no manner requires drainage of Petitioners' gas. Respondents contend that they have shown that the State of Texas provides an adequate remedy against drainage by the procedure provided for to allocate reservoir allowables among the wells in a reservoir in such a manner as to protect correlative rights but that Petitioners have failed to timely seek to secure a change in the allocation formula so as to substantially reduce or eliminate any drainage. This is all the State is required to do under the Constitution. Furthermore, any drainage suffered by Petitioners results not from the inability of the Commission to set an arbitrary ceiling on market demand but rather from the re-assignment of their wells' allowables which they cannot produce to other wells in the field under the provision of the allocation formula which has been adjudged to be invalid. Petitioners' true complaint is not that the Railroad Commission is required under the statutes to compel drain-

age but rather that the Commission under the statutes is not allowed to take affirmative action to so restrict reservoir allowable as to protect Petitioners from their own negligence in failing to timely assert the provided remedy.

WHEREFORE, Respondents pray that because this Honorable Court does not have jurisdiction and because Petitioners' constitutional rights have not been violated the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Levert J. Able, an attorney for Respondents Woods Exploration and Producing Co., Inc., and Southeastern Pipeline Company, depose and say that I have this day served copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari, by mailing the same by United States Certified Mail, Return Receipt Requested, postage prepaid, to the following counsel of record for Petitioners in said cause:

Honorable Leroy Jeffers
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Levert J. Able

SUBSCRIBED AND SWORN To before me on this the 17th day of November, A.D. 1966.

J. Brunson

Notary Public in and for
Harris County, Texas